No. 269. 51

Brief of Brown & Spurlock

Filed Feb. 24, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 269.

THE ADDYSTON PIPE AND STEEL COMPANY, DENNIS LONG & COMPANY, ANNISTON PIPE AND FOUNDRY COMPANY, SOUTH PITTSBURG PIPE WORKS, AND CHATTANOOGA FOUNDRY AND PIPE WORKS,

Appellants,

vs.

THE UNITED STATES.

Appeal from the United States Circuit Court of Appeals, for the Sixth Circuit.

Brief and Argument for Appellants.

FOSTER V. BROWN,
FRANK SPURLOCK,
Counsel for Appellants.

DAO GOMAN & COOKE, PRINTERS, CHATTANOOGA

Supreme Court of the United States

October Term 1898.

THE ADDYSTON PIPE & STEEL COMPANY, ET. ALS. *Appellants*,

vs.

UNITED STATES, *Appellee*

Statement of Case and Brief in Behalf of Appellants

STATEMENT OF CASE

The petition filed in this case against The Addyston Pipe & Steel Company, of Cincinnati, Ohio, Dennis Long & Co., of Louisville, Kentucky, Howard-Harrison Iron Company, of Bessemer, Alabama, Anniston Pipe & Foundry Company, of Anniston, Alabama, Chattanooga Foundry & Pipe Works, of Chattanooga, Tennessee, and South Pittsburg Pipe Works, of South Pittsburg, Tennessee, made the following charges:

That the six companies named were the only ones within the territory covered by the thirty-six states enumerated hav-

ing a capacity sufficient to supply the demand, in said territory, for cast-iron pipe; that the few other pipe works located in the same territory were, on account of limited capacity, unable to compete with the other companies, and had been driven out of the market by them.

That "in order to monopolize the trade in cast-iron pipe, especially in the above named states and terrritories, and force the price of same to an unreasonable and exhorbitant rate, and destroy all competition in regard thereto, and force the public to pay exhorbitant and unreasonable prices for said cast-iron pipe they did," at a time and place named, "enter into a contract or combination in the form of trust or conspiracy, in restraint of trade or commerce among the several states and territories above named, in regard to the manufacture and sale of cast-iron pipe," in violation and defiance of law, "and was intended by defendants to enable them to defraud the public in the purchase and use of the pipe manufactured by them;" that the companies were and had been since the date named "operating their shops in obedience to and according to the agreement entered into on said date, *and are now engaged in selling and shipping from their shops said cast-iron pipe into other states and territories than the states and territories in which defendants reside, and under contracts entered into with citizens of such other states and territories.*"

That as a part of said combination among defendants as to any work done or pipe furnished in the territory named, and to make this purpose effectual, it was agreed that a bonus should be charged on every ton of pipe sold in this territory, the amount of bonus being determined by how much the combination could force the customer to pay and represented the amount over and above a fair price, and ranged from three to nine dollars.

That it was also a part of said agreement that each of

said companies be allotted certain cities which it had the right to furnish, called the "reserve cities," the other companies only bidding on the work to be done for such cities such sums as would enable the particular company to secure the work.

That "defendants on or about the 27th day of May, 1895, to enable them to realize greater profits to themselves on the sale of their pipe, and to make the monopoly in their territory on the use and sale of the same, more complete, and to more fully effectuate the conspiracy entered into on said 28th day of December, 1894, adopted what they called the 'auction pool' plan for bidding on work in the 'pay territory'—the thirty-six states named. To carry this out each of the defendants selected one man, and the six men selected constituted an executive committee, which said committee was to be located in some central city, at present at Chicago, to whom all inquiries for pipe were to be referred. On receipt of such inquiry, this committee, in a room with no one present but themselves, secretly and fraudently bid for the job, the one agreeing to pay the greatest amount of 'bonus' of course to receive it. By this secret, and fraudulent and criminal manner petitioner charges all the work done by defendants since June 1, 1895, has been secured. After this 'auction pool' was over, as to each particular job, each of the defendants was notified whose representative had bid the most, and the amount of the bid, and this bid was sent by the defendant securing the job at the 'auction pool' to the party wanting the pipe, the other defendants all sending in a bid for a higher price, carrying out their criminal agreement to 'protect' each other, and securing the job to the highest bidder at the 'auction pool,' thus reversing the order of things, by giving the job to the highest, instead of the lowest bidder, the deluded customer of course being ignorant as to the manner in which he is being swindled."

It was also charged "that the kinds of contracts secured by defendants are, in the main, contracts to furnish pipe to gas and water companies, and to municipal corporations for sewerage and other purposes, which said contracts, after advertisements for bids, are let to the lowest bidders."

Appellants demurred because it did not appear from the terms of the contract or combination as alleged that it undertook directly to restrain or monopolize trade or commerce among the states.

At the same time they answered as follows:

That they were and had been for a number of years, engaged in the manufacture of cast-iron pipe, a commodity capable of unlimited production, and sold only to or for other corporations, and generally under contracts requiring it to be manufactured, tested and delivered according to specifications furnished in each case, so that sales thereof differed from simple contracts of sale of ordinary merchandise.

It was denied that the companies named were the only ones situated in the territory described; but on the contrary averred that there were a number of other similar works in said territory, and some of them, with respect to a large part of said territory, better situated for securing advantageous freight rates.

That the other companies in the same territory had a larger daily capacity than the aggregate daily capacity of all the defendant companies, and there still were other works outside of said territory, and which sold pipe in all states of the Union, some of them alone having a greater capacity than all defendants combined.

That practically no sales of pipe were made as manufacturers usually disposed of their products, but that all the pipe was manufactured and delivered under contracts which had

been previously let to the lowest bidder after advertising for bids and inviting the competition of all companies in the United States.

That this method of letting their contracts brought all pipe companies into active competition for each contract to be let to the lowest bidder, gave to gas, water and municipal corporations the advantage of buying at the ruinous competition of the bidders, while said bidders had no other market; that this method of letting all contracts prevented the establishment of fair market prices and arrayed each pipe company against the others with strong motives not only to underbid, but otherwise to injure each other.

That to meet this situation they united in an association for mutual advantage in various respects, and to secure among themselves a fair distribution of the contracts to be let, according to their relative capacities. To secure this end it was agreed that a certain part of the amount received by each company on every contract taken in certain states called "pay territory" should be held as a fund owned in common and kept in the debit account of the concern taking the contract until settled by clearance balances to equalize the accounts. The amount out of each sale held as a partnership or common fund was called the "bonus," and was the same whether the pipe was sold above or below the cost thereof.

From the time the association was formed, in December, 1894, until May, 1895, it was a fixed sum per ton, varying in amounts in the different states covered by the agreement. It did not prevent competition among the six companies except that to the limited extent on the price of each ton of pipe sold there was to be an accounting to the other companies.

That from and after May 1, 1895, and at the time petition was filed, there was in force a different arrangement for fixing the so-called "bonus." There were meetings in which each of the companies were represented by a competent sales-

man, and to which were referred all the contracts to be let. These representatives of the six companies first determined what would be a fair amount to bid on each contract, and then determined among themselves which company should have the co-operation or protection of the others in securing the contract. This was determined by bidding. The company bidding the largest "bonus," or in other words, agreeing to treat the largest per cent. of the price to be bid for a contract as the common or partnership fund was selected to secure the contract.

That the price as between the company securing the contract and the customer was always fair and reasonable and fixed by competition from companies outside of the association which could and did put in bids on all the contracts let. The contracts could only be secured when one of the associated companies put in the lowest bid.

The only effect of this arrangement was to avoid destructive competition and secure a relatively equal distribution of the contracts.

It was expressly denied that this agreement was intended to or did restrain or monopolize inter-state trade or commerce, or any part thereof; or that it was under the peculiar circumstances an unreasonable restraint on the competition that would otherwise exist between defendants.

EVIDENCE.

Petitioner filed the following affidavits:

Martin Manion stated that his firm took a contract in 1895 to lay pipe and extend the mains of the New Orleans Water Company, and that previous to doing so he asked for propositions from the leading foundries of the south and southwest; that he could not bid on the contract because the

prices submitted were too high; that from Chattanooga being $21.75 per ton; but that a few days before the biddings were opened his firm received offers from the Radford Pipe & Foundry Co., of Virginia, to furnish the pipe at $14 and $15. This price was subsequently advanced by the Virginia Company.

He also learned from a third party that he could get pipe from one of appellants if it was bought for export.

This affidavit and letters attached show that the pipe which the Virginia Company agreed to furnish for $14.00 and $15.00 was old pipe that had been rejected by the Syracuse, N. Y., Water Company, and had not been manufactured under the specifications and terms prescribed by the New Orleans Company.

When the latter company was informed of this fact by one of appellants and another company not in the association, it declined to allow Manion's firm to use the old pipe in their system, and he was compelled to buy other pipe, on which account he claims to have been seriously damaged.

Record, 37.

Cephas M. Brown, the next witness, files extracts from the minutes of the Board of Water Works Commissioners, showing the openings of biddings for the supply of pipe to Atlanta, from which it appears that the first proposition of Anniston Company was $24.00 per ton, and three others of the associated companies and R. D. Wood & Co., of Philadelphia, put in higher bids, all of which were rejected, and on new bids being submitted the contract was awarded to the Anniston Company at $22.75 per ton.

The specifications and requirements of the contract are not stated.

Record, 43.

James H. Bible, the District Attorney who filed the petition, details certain conversations he had with parties at the

office of the water company in St. Louis soon after he filed the petition. The substance of these conversations is: that the associated companies were so situated with reference to St. Louis that on account of freight rates they could hold the price of pipe at about $23.00. But it was shown in the same conversation that in 1893, before there was any association, the price was $24.90, $26.80 and $25.60, except in one instance.

Record, 51.

Emory S. Foster, next affiant, deposed: that he was the official of the city of St. Louis whose business it was to advertise for bids on pipe to be furnished for that city; that the city charter required advertisement for bids, and the awarding of the contract to the lowest bidder; that appellants and all others who made bids were regarded as bidding in good faith and honestly competing with each other. He files statement of bids made, showing no material change in price since December 28, 1894.

Record, 54.

J. E. McClure, next affiant, was the confidential stenographer of one of appellants, and stated that he had been so employed for several years; that he was present on December 28, 1894, when the association was formed between the six companies; that he had obtained copies of the proceedings of the association, and copies of letters written by various parties, all of which he exhibited with his bill.

This is the only witness who undertakes to prove that the "bonus" referred to in the proceedings represents "the price charged for pipe, over and above the legitimate price of same, and the price they would be willing to sell for if the pool did not exist between them and they had to compete with each other in open market."

Record, 61.

The first agreement, as shown by the minutes, was as follows:

"*First.* The bonuses on the first 90,000 tons of pipe secured in any territory, 16-inch and smaller sizes, shall be divided equally among six shops.

"*Second.* The bonuses on the next 75,000 tons, 30-inch and smaller sizes, to be divided among five shops, South Pittsburg not participating.

"*Third.* The bonuses on the next 40,000 tons, 36-inch and smaller sizes, to be divided among four shops, Anniston and South Pittsburg not participating.

"*Fourth.* The bonuses on the next 15,000 tons, consisting of all sizes of pipe, shall be divided among three shops, Chattanooga, Anniston and South Pittsburg not participating. The above division is based on the following tonnage capacity:

"South Pittsburg	15,000 tons.
"Anniston	30,000 "
"Chattanooga	40,000 "
"Bessemer	45,000 "
"Louisville	45,000 "
"Cincinnati	45,000 "

"When the 220,000 tons have been made and shipped and the bonuses divided as hereafter provided, the auditor shall set aside into a 'reserve fund' all bonuses arising from the excess of shipments over 220,000 tons, and shall divide the same at the end of the year among the respective companies according to the percentage of the excess of tonnage they may have shipped (of the sizes made by them) either in pay or free territory. The above proposition is intended to include all ordinary pipe specials in the tonnage named. It is also the intention of this proposition that the bonuses on all pipe larger than 36 inches in diameter shall be divided equally between the Addyston Pipe & Steel Company, Dennis Long & Company and the Howard-Harrison Iron Company. Pend-

ing the discussion of Mr. Dimmick's motion, the meeting adjourned at 2 P. M. for dinner.

"The meeting was called to order by the chairman at 3 P. M. Messrs. Long and Callahan, representing the Louisville shop, and Haughton and Davis, representing the Cincinnati shop, were present.

"The chairman of the meeting stated that the object of the meeting was to determine whether the Louisville and Cincinnati shops would be willing to become members of the association. He went over the ground and dwelt on the advantages that would result from an association as it could be conducted by the six shops, and also presented the disadvantages of working separately, the cutting of prices and other disastrous consequences that had resulted in the past from disorganization, jealousy and rivalry in business.

"He explained some of the workings of the Southern Association and set forth some of the advantages resulting from a thorough knowledge on the part of each member of the Southern Association of the business situation in the territory in which the association had operated during the past year.

"The resolution of J. K. Dimmick, providing for the passage of the proposition submitted by Mr. Nichols (F. B. Nichols), was voted upon and all companies voted 'Aye,' the Cincinnati representatives, however, reserving the privilege of submitting the proposition as voted upon to the directors of their company for their approval.

"Memorandum of agreement upon proposition of F. B. Nichols, which has already been agreed upon by the undersigned this, the 28th day of December, 1894.

"*First. Resolved*, That this agreement shall last for two years from the date of the signing of same, until December 31, 1896.

"*Second.* On any question coming before the association requiring a vote, it shall take five affirmative votes thereon to carry said question, each member of this association being entitled to but one vote.

"*Third.* The Addyston Pipe & Steel Company shall handle the business of the gas and water companies of Cincinnati, Ohio, Covington and Newport, Ky., and pay the bonus hereafter mentioned, and the balance of the parties to this agreement shall bid on such work such reasonable prices as they shall dictate.

"*Fourth.* Dennis Long & Co., of Louisville, Ky., shall handle Louisville, Ky., Jeffersonville, Ind., and New Albany, Ind., furnishing all the pipe for gas and water works in above named cities.

"*Fifth.* The Anniston Pipe & Foundry Company shall handle Anniston, Ala., and Atlanta, Ga., furnishing all pipe for gas and water companies in above named cities.

"*Sixth.* The Chattanooga Foundry & Pipe Works shall handle Chattanooga, Tenn., and New Orleans, La., furnishing all gas and water pipe in the above named cities.

"*Seventh.* The Howard-Harrison Iron Company shall handle Bessemer and Birmingham, Ala., and St. Louis, Mo., furnishing all pipe for gas and water companies in the above named cities; extra bonus to be put on East St. Louis and Madison, Ill., so as to protect the prices named for St. Louis, Mo.

"*Eighth.* South Pittsburg Pipe Works shall handle Omaha, Neb., on all sizes required by that city during the year 1895, conferring with the other companies and co-operating with them; thereafter they shall handle the gas and water companies of Omaha, Neb., on such sizes as they make.

"*Note.* It is understood that all the shops who are members of this association shall handle the business of the gas and water companies of the cities set apart for them, including all sizes of pipe made by them.

"The following bonuses were adopted for the different states named below: All railroad or culvert pipe, or pipe for any drainage or sewerage purpose, on 12-inch and larger sizes shipped into 'bonus territory,' shall pay a bonus of $1.00 per ton. On all sizes below 12 inches and shipped into 'bonus territory' for the purposes above named, there shall be a bonus of $2.00 per ton.

"LIST OF BONUSES.

Alabama	$3 00	Birmingham, Ala	$2 00
Anniston, Ala	2 00	Mobile, Ala	1 00
Arizona Territory	3 00	California	1 00
Colorado	2 00	Indian Territory	3 00
North Carolina	1 00	Tennessee, east of C. land	2 00
Tennessee, middle and west	3 00	Illinois, except Madison and East St. Louis, as previously provided	2 00
Wyoming	4 00	North Dakota	2 00
Oregon	1 00	Florida	1 00
Ohio	1 50	Atlanta, Ga	2 00
South Dakota	2 00	Idaho	2 00
Georgia	2 00	Oklahoma	3 00
Georgia coast points	1 00	Texas, interior	3 00
Nevada	3 00	Washington Territory	1 00
Wisconsin	2 00	West Virginia	1 00
Texas, coast	1 00	Kentucky	2 00
Michigan	1 50	Mississippi	4 00
Kansas	2 00	Montana	3 00
Louisiana	3 00	New Mexico	3 00
Missouri	2 00	Minnesota	2 00
Nebraska	3 00	Indiana	2 00
South Carolina	1 00		
Utah	4 00		
Iowa	$2 00		

"All other territory free.

"On motion of Mr. Llewellyn, the bonuses on all city work as specially reserved, shall be $2.00 per ton.

"It is agreed in the first place that every order shall be reported daily, whether from free territory or bonus territory, giving consignee and destination.

"Reports of shipments shall be made on the 1st and 16th of each month for the preceding half month's shipments, and the auditor is hereby authorized to draw on each company at sight for their debit balances for the time reported.

"*Resolved*, That every member of this association be required to file with the auditor a report of all orders on their books at the date that this association goes into effect, and that the report shall be final and binding, and only such orders shall be exempted from bonus payment in pay territory; further, as soon as it is ascertained that all have agreed to come into this association, that they at once notify the parties to whom they have made quotations, withdrawing the same at once, and no orders are to be accepted on quotations previous to entering this agreement by the parties hereto, unless they are willing to pay the bonuses established.

"The following resolution was offered by W. L. Davis:

"*Resolved*, At any meeting of this association at any time any member having grievances against any buyer for default of payment or other grounds, complaint may be submitted at a meeting and ask the co-operation of the other members in such a manner as may be decided upon to compel the adjustment of said grievance, either by refusing to quote the party in default on pipe, or such other means as the association may agree upon; or the party aggrieved shall at once report the complaint to the auditor, who shall make carbon copies and send one to each member of the association.

"Agreed that all quotations after this date forward shall be made with a view of paying bonuses fixed this date until further advised.

"Following resolution was offered by F. B. Nichols:

"*Resolved*, That Mr. Llewellyn be made acting chairman under this agreement, until he has relief, and that in the event that the Addyston Pipe & Steel Company conclude at their board of directors' meeting to confirm the action of their representatives, Messrs. Haughton and Davis, at meeting today, that they wire Mr. Llewellyn, and that he, on receipt, wire each of the other parties hereto, and that the agreement shall then immediately go into effect and become binding on all parties.

"*Resolved*, That the acting secretary mail copy of these minutes to each party hereto on tomorrow, December 29th, 1894.

"The following resolution was offered by F. B. Nichols:

"*Resolved*, That in the event this association is entered into, that the Howard-Harrison Iron Company release each and every party from their obligation in reference to Minneapolis letting January 7th, 1895; in the event that the agreement is not entered into, the Howard-Harrison Iron Company are still to endeavor to handle under agreement entered into at Chicago and subsequently changed at Minneapolis."

In pursuance to this agreement the following by-laws were adopted:

"At a meeting of the Associated Pipe Works, 8 Bates Block, Chattanooga, Tenn., January 23, 1895, the following by-laws were adopted:

"*First.* This association shall last two years from January 1st, 1895, and shall have an executive committee, consisting of a member of each company.

"*Second.* The officers of this association shall be:

"1. A chairman, who shall preside at all meetings, and call special meetings when he may deem it advisable, and have general supervision of the affairs of the association.

"2. An auditor, who shall have an office at Chattanooga and shall keep the records of the association and perform the duties of secretary, in the absence of a regular appointed secretary; make such reports and statements as may be hereinafter provided; checking the books and accounts of the several shops who are members of this association, and perform such other duties as may be hereafter assigned to him.

"3. An assistant to the auditor, who shall perform duties of the auditor during his absence from the office of the associ-

ation and assist him regularly in all the duties of the office.

"*Third.* 1. Each shop shall report daily to the auditor all orders secured in bonus or free territory, giving the shop number of same, number of pieces of each size and the weight per piece or such part of both as can be given from the nature of the order.

"2. On the 1st and 16th of each month they shall report to the auditor all shipments made in all territory, giving shop number, destination, and sizes of each shipment, and a summary in tons or pounds; showing the amount of bonus and tonnage, of the bonus as well as free territory.

"*Fourth.* 1. The auditor shall make carbon copies daily of all reports received, and send one to each shop, and to such others as may be designated.

"2. He shall keep such records and accounts as will enable him to exhibit at all times the exact status of the affairs of the association.

"3. He shall on the 1st and 16th of each month, or as soon as practicable, send to each shop a statement of all shipments reported in the previous half month, with a balance-sheet showing the total amount of the premiums on shipments, the division of the same, and a debit-credit balance of each company; also a statement of the free orders secured during the same period; and a memorandum of balance payable from one to another.

"4. The auditor shall once each month thoroughly check the books of each company in such manner as may be necessary to determine the fact that on all orders secured and shipments made, the bonuses paid into the association, have been properly made and performed by each member of the association, and shall make a monthly report to all of the parties of the association, of the results of the checking of the books of each company; and shall be authorized to charge and credit each company in such a manner as may be neces-

sary to make the books and records correct, according to the basis of the agreement entered into December 28th, 1894, and further amended and perfected this date.

The following resolution was adopted:

"Whoever has a representative at any public letting shall instruct him to send to the auditor a full list of the bids and bidders on same; also that all information in regard to work taken in pay territory by the shops outside of this association shall be reported to the auditor, who shall keep a proper record of such information and send carbon copies of same to all of the members of this association.

"It was agreed that the six members of this association divide the expenses of the Chattanooga office, share and share alike.

"On motion adjourned."

Record, 64–69.

In May, 1895, the plan of the association was changed in accordance with the following resolution:

"WHEREAS, The system now in operation in this association of having a 'fixed bonus on the several states' has not in its operation resulted in the advancement in the prices of pipe as was anticipated, except in 'reserved cities;' and some further action is imperatively necessary in order to accomplish the ends for which this association was formed; therefore,

"*Be it Resolved*, That from and after the first day of June that all competition on the pipe lettings shall take place among the various pipe shops prior to the said letting. To accomplish this purpose it is proposed that the six competitive shops have a 'representative board' located at some central city to whom all inquiries for pipe shall be referred, and said board shall fix the price at which said pipe shall be sold, and bids taken from the respective shops for the privi-

lege of handling the order, and the party securing the order shall have the protection of all the other shops. Should it be deemed best for the interest of this association to eliminate the southern territory from the control of the 'general pool,' and refer all lettings in said territory to the southern shops for their exclusive action, upon the agreement of the four southern shops to pay this association the fixed bonus now in force on said southern states, said southern shops to have the option of doing so.

"All division of bonuses to remain as now established during the year 1895."

Record, 70–71.

McClure also filed copies of the minutes of other meetings, but showing no other contract than already quoted. The subsequent meetings related to the "bonus" on different jobs obtained. The correspondence shows only the individual views of the members at different times as to prices, bonuses, etc. The minutes quoted show all there was of an agreement.

In their conclusion as to the facts established, the Circuit Court of Appeals attaches little or no weight to the affidavits filed in behalf of appellants.

These affidavits are as follows:

I.

That there were in the United States and in the territory of the alleged monopoly, the pipe works as stated on pages 37 and 38 of the Record, being nine in the territory embraced in the bill and ten others in the outside states, as follows:

SHOPS LOCATED IN TERRITORY COVERED BY BILL IN ADDITION TO MEMBERS OF ASSOCIATION.

	Capacity per day
Ohio Pipe Co., Columbus, O	150 tons
Lake Shore Foundry, Cleveland, Ohio	200 "
J. B. Clow & Son, New Comerstown, O	75 "
Peninsular Car & Foundry Co., Detroit, Mich	100 "
Shickle, Harrison & Howard, St. Louis, Mo	60 "
Rusk Foundry, Rusk, Texas	50 "
Oregon Iron Works, Portland, Oregon	50 "
Colorado Iron & Fuel Co., Pueblo, Col	75 "
West Superior Iron Co., Duluth, Wis	75 "
	835 tons

SHOPS LOCATED OUTSIDE OF TERRITORY MENTIONED IN THE BILL.

	Capacity per day
Donaldson Iron Co., Emaus, Pa	100 tons
Warren Fdy. & Mach. Co., Phillipsburg, N. J	200 "
McNeil Pipe & Fdy. Co., Burlington, N. J	225 "
R. D. Wood & Co., Millville, Florence, Camden, N.J.	400 "
Reading Foundry, limited, Reading, Pa	125 "
Jackson & Woodfin, Berwick, Pa	75 "
Buffalo Cast Iron Pipe Co., Buffalo, N. Y	100 "
Glamorgan Iron Co., Lynchburg, Va	75 "
Nat. Pipe & Fdy. Co., limited, Scottsdale, Pa	200 "
Utica Pipe & Foundry Co., Utica, N. Y	50 "
	1,550 tons

Record, p. 36–37.

That affiants were familiar with the pipe business as buyers, knew at different times the cost of pig iron, the capital required to operate pipe works, and thought the prices paid by them were reasonable and fair; they were the lowest prices that could be obtained on bids submitted to different works.

These statements were made by contractors, managers of municipal water and gas plants, and others whose business would require them to keep informed of the prices of pipe:

H. D. Hallett, Record, p. 103;

F. A. W. Davis, Record, p. 105;

W. H. Garnett, Record, p. 108;

Casper Chisholm, Record, p. 111;

T. W. Sneed, Record, p. 153;
A. L. Bierbower, Record, p. 143;
Jno. Canefield, Record, p. 181;
George C. Morgan, Record, p. 104;
R. R. Dickey, Record, p. 106;
August Herman, Record, p. 110;
P. B. McKenzie, Record, p. 112;
C. C. Ferguson, Record, p. 174;
W. S. Kuhn, Record, p. 157;

and others to the same effect.

These affidavits show that when contracts to furnish pipe were to be let, bids were asked from the other pipe works, and the contract awarded to the lowest bidder; that the bids were based on specificatious requiring certain character of pipe to be manufactured and delivered, sometimes in the outskirts of the cities, or where it was to be laid, and subject to rejection at the place of delivery.

Record, 153, 206, 237.

A number of the affidavits were made after McClure had agreed to furnish evidence of the agreement and to prove that affiants had been swindled and were entitled to damages.

Park Woodard, superintendent of Atlanta Water Works, and H. C. Erwin, one of the aldermen of that city, state that McClure made the same proposition to Atlanta, whereupon they investigated and found that the prices which Atlanta had paid to the Anniston Company were not exorbitant, and afforded the company no more than a reasonable profit.

Record, 166-167.

M. L. Holman, Water Commissioner for St. Louis, filed a statement showing the prices paid by that city from April, 1892, to October, 1896. From this it appears that the contract

prices before the association was formed, ran as follows: April 12, 1892, $24.95; July 26, 1892, $25.48; October 11, 1892, $25.48; August 7, 1894, $19.94. The prices after the association was formed were: March 26, 1895, $19.85; May 17, 1895, $20.96; September 17, 1895, $22.47; February 4, 1896, $24.00; July 28, 1896, $19.64; October 6, 1896, $19.94.

Record, pp. 196, 197.

A copy of one of the contracts made with the city of St. Louis details the specifications as to the size of pipe, its manner of manufacture, capacity, loading on cars, and how it was to be stacked or piled in the pipe yards at St. Louis; the pipe was to be tested at the works whenever desired by agents of the city at the company's expense.

It was also provided that agents of the city might reject pipe when received, and that citizens might make complaints while it was being laid, and call for investigations to be made at the company's expense. There is also incorporated an ordinance prohibiting the working of laborers more than eight hours a day on penalty of forfeiting the contract and becoming ineligible to make future contracts.

The performance of all these conditions and others, was secured by bond with sureties.

Record, p. 246.

Before any contract for pipe is advertised there is required to be made by the water department an estimate of cost which is not to be exceeded. All bids could be rejected.

The price at which pipe has been sold to St. Louis has always fallen considerably below this estimated price.

This is regarded by the St. Louis officials as the best safeguard against unfair prices on all contracts let under its ordinances, and was one of the reasons why that city refused to bring suit on the information which McClure proposed to furnish.

Letter of W. C. Marshall, Tr., p. 254.

II.

There were filed affidavits from at least five of appellants' competitors, all stating in substance as follows:

"The company represented by affiant was, during the years 1895 and 1896, an active competitor of the six defendants in the suit above referred to for orders in the territory named in said section 3 of said petition above referred to, and secured during the years 1895 and 1896 its reasonable proportion of the orders in said territory.

"A very large proportion of the orders which are placed for cast-iron pipe are placed after advertising for bids and receiving proposals which are opened in the presence of, and read to, the bidders; even when bids are not solicited by a regular advertisement, but by specific invitation by letter or otherwise to each bidder, the orders are in most cases given to the lowest bidder. I am therefore in position to know that a very large proportion of the orders secured during the years 1895 and 1896 by the six defendants in the suit above referred to, were taken at prices which were not only fair and reasonable and such as would not leave the manufacturer more than a very moderate margin of profit, but that on many of the orders the prices were so low as not to leave a reasonable profit to the manufacturer."

A. C. Holt, for Nat. Fdy. & Pipe Wks., Record, 147.

W. E. Clow, for J. B. Clow & Sons, Record, 149.

Oliver Phelps, for Mich. Pen. Car & Fdy. Co., Record, 155.

C. E. Burke, for Lake Shore Fdy. Co., Record, 163.

H. E. McWane, for Glamorgan P. & F. Co., Record, 164.

III.

The officials of appellants filed affidavits to the following effect:

That pipe could be manufactured in unlimited quantities, and owing to the manner in which contracts were let to supply pipe, the manufacturers being required to bid on specifications varying in their requirements, there could be no market price fixed, but the same depended in each case on the terms of the contract to be filled;

That on large orders the purchaser sent inspectors to the works with the option to reject any pipe which he disapproved, and owing to difference in rules of inspection the per cent of pipe rejected would vary from 1 to 25 per cent; and in fixing the price to be bid on any contract it was necessary to consider the terms of payment, the specifications and tests and other circumstances peculiar to that contract;

That while appellants have the advantage in freight in the portions of the territory nearest to them, there were other pipe works near the sea coast that had better rates to New Orleans and other cities near the coast;

That in the last ten years new pipe works in the east and south had been built until the supply of pipe exceeded the demand and necessitated some restriction in competition to prevent ruin to the individual plants. It was in consequence of and to avoid this ruinous competition that appellants formed the association of December, 1894, as modified by the resolution of May, 1895; the property of appellants was useful only in the pipe business, and would be destroyed if it could not be so used;

That unreasonable and unfair prices had not been charged under the agreement, and were in all cases fixed by competition with other concerns, and had been on an average less in 1894, 1895 and 1896 than in preceding years;

That on account of the large cost of closing down they could afford to and did frequently sell pipe at a loss, especially in that territory to which the bonuses did not apply; and they could afford to sell pipe on hand or in stock at a much cheaper rate than pipe manufactured under the specifications usually presented;

That the bonus was not the sum above a fair price, but was the portion of the price representing the common interest of appellants, of which accounts were kept and balances remitted twice a month, and, being deducted from a fair price, operated to restrain each concern from undertaking to do more than its fair share of the work which all could secure, or was so intended by the agreement; for the year 1895 the actual clearance settlements amounted to only 38 cents per ton, and from January 1, 1895, to September 15, 1896, to 58 cents, the latter figure being larger on account of the small sales in the latter part of 1896.

A. F. Callahan, R. 216.
C. W. Harrison, R. 177.
M. Llewellyn, R. 200.

As recited in the decree of the Circuit Court, the cause "was heard upon application for injunction as prayed in the original bill, which hearing was by stipulation of the parties treated as a hearing upon the merits."

R. 288.

The affidavits in behalf of the United States were filed on the 25th day of January, 1897, (R. 37, 43, 51 and 59), the day on which the case was heard.

The affidavits in behalf of appellants were prepared for the purpose alone of meeting the allegations of the petition or bill for injunction. They were necessarily, therefore, of a

formal type—formal in the sense that instead of one there were many to the same effect in denial of each allegation of the bill. They were also filed on the day of trial.

If appellants are not denied the probative effect of these affidavits because they are numerous, then we may assume that there is established, by this great number of uncontradicted witnesses, the following facts:

1. That the business in which appellants were engaged was of a private nature, the commodity they dealt in was susceptible of unlimited production, and manufactured in the main for certain other corporations on contracts secured by bids based on conditions and specifications so varying in each case as to affect and vary the price.

2. That on account of the necessity of constant operation, the cost of closing down and resuming work, and the advantage or difference in selling from stock instead of manufacturing under specifications, and other differentiating circumstances, the price at which one order for pipe is filled is no test of the fair price at which another contract should be taken.

3. That in the territory in which appellants were alleged to have monopolized the trade in cast-iron pipe there were in December, 1894, foundries having a capacity in excess of the demand, and a custom of letting all contracts to the lowest bidder, including appellants and all others, thus producing a ruinous competition in securing each contract to be let.

4. That in December, 1894, the six appellants agreed that certain fixed sums per ton on all contracts they secured in thirty-six given states should be deducted from the price at which the contract was taken, and credited to the common account and the balances remitted from one to the other at stated periods; that from and after May, 1895, that part of the price on contracts secured which represented the common

interest, was fixed in advance of each letting by competition among appellants, the one offering to treat as a community fund the largest part of the contract price to receive the assistance and protection of the others in securing the contract, in which all were interested to the extent of the so-called bonus.

The appellants, in number and capacity, were but a fraction of all the bidders on each contract let, and the price to buyers was in all cases fixed by competition with others and not by the agreement existing among appellants, the bonus being deducted from the price thus fixed and not added to it. After equalizing the bonus charged from January, 1895, to September, 1896, the balance was only 58 cts. per ton.

5. That the prices received by appellants were considered fair and reasonable by their customers who were acquainted with the terms and conditions of each contract let, and who professed to know the cost of material and manufacture.

We therefore insist: That appellee having failed to prove any of the allegations of the petition except the existence of the association admitted by the answer, the only question for consideration is whether that agreement of itself, and for the purposes as shown by appellants, constitutes a monopoly or contract in restraint of interstate commerce.

By the terms of the contract each of appellants was left in full ownership and management of its plant. There was no Central Committee or Board having power to control the business affairs or works of these companies. The pipe manufactured and shipped was always the exclusive property of the company which manufactured and sold it. Neither of the other companies, either singly or collectively, had any interest in pipe manufactured and sold by either of appellants.

But the agreement did provide that whenever either of the parties thereto secured a contract in certain territory the

others were to share in this price to a certain extent, being the portion of which an account was to be kept for the benefit of all, and by an accountant representing all. The remainder of the price was the exclusive property of the selling company.

This portion of the selling price, called a bonus, which was to be divided among the companies according to their relative capacities, was first a fixed sum per ton, according to the locality in which it was sold, but was afterwards fixed in advance on each contract to be let. It in substance constituted a partnership interest in the selling prices to the extent of the bonus. If all did relatively the same amount of work on the same bonus, there would be an exact equalization, whether the bonus was large or small. The bonus was only material when the amounts sold by the companies were unequal. When the contracts that could be secured were less than the supply of the six companies, the bonus was intended to and did make it to the advantage of each that all should have a reasonable share of the contracts—otherwise the bonuses would have become a ruinous burden to the companies securing an excessive amount of the trade.

If the bonus was an amount over and above a fair price it would not operate to restrain appellants, but only to maintain higher prices.

The purpose and effect of this association was to provide that there should be a bonus for division among the members, to be deducted out of prices received, and proper accounts kept and settlements made thereof by periodical remittances of balances.

From December, 1894, to May, 1895, the bonus was a sum stated in the contract itself of so much per ton on contracts taken in each state in the territory covered; from May, 1895, the bonus was agreed on in advance of the letting of each contract, after bids were solicited or advertised for, and before the contract was actually let.

This agreement or "auction pool" as it was called, determined the "bonus" or the extent to which all the members of the association would be entitled to share in the purchase price to be paid under the contract, if it was secured. It also resulted that the member bidding, or agreeing to pay, the largest bonus became entitled to the assistance or protection of the others in securing the contract.

When the bonus was thus agreed on, and the member selected to make the bid, the association compact had accomplished its purpose, and it was thereafter that the contract was let, as advertised and bid on by the selected member of the association. If this bid was the lowest the contract was secured and the pipe manufactured and delivered in accordance with the terms thereof.

If an outside manufacturer put in a lower bid, as often happened, the contract was not secured.

There was no contract between a buyer and purchaser of goods, either involving or not involving shipment from one state to another, until after the contract was awarded and the association compact had ceased to operate. There was not until this time any kind of contract between buyer and seller involving either domestic or interstate commerce. The bids were usually opened in the presence of the bidders, but whether so or not, the contracts were advertised, let, executed and performed under local regulation, state or municipal.

If the foundry of the successful bidder was in a different state from that in which the contract was secured, it was necessary after the pipe was manufactured to ship it to the place of delivery, where it was inspected and rejected or received by the purchaser. It was when shipped the exclusive property of the company which had taken the contract to manufacture and deliver it. While the other members of the association had been credited with a certain portion of the selling price, this had either then been paid or at least only stood as a charge against the seller independent of his con-

tract with the purchaser, and in no manner affected the ownership of the pipe.

There is this final consideration of fact which was overlooked, as we think, by the Circuit Court of Appeals: *Contracts to supply pipe were always let to the lowest bidder, and by the custom of buying even if no association had existed, each contract would have been let to one company to the exclusion of all the others. The selection therefore of one out of six to make the bid could not have restrained five others from securing the contract.*

The Circuit Court dismissed the petition, from which there was an appeal to the Circuit Court of Appeals of the Sixth Circuit.

In this Court it was held that the agreement of association was a contract, combination or conspiracy in restraint of interstate trade or commerce, that the decree of the Circuit Court should be reversed and the defendants enjoined as prayed in the petition.

From this decree defendants in the petition have appealed to this Court and assigned the following errors:

"*First.* Because the dealings in and the sales to be made of cast-iron pipe under the agreement or association entered into between defendants, as shown by the pleadings and evidence and contemplated by said agreement or association, consisted of contracts to supply pipe to municipal gas and water companies, let to the lowest bidder, under and subject to municipal regulations and local laws.

"*Second.* Because it was not the intent or effect of said

association or agreement to restrain or monopolize trade or commerce among the states.

"*Third.* Because defendants constituted but a part of the dealers in cast-iron pipe trading in the territory to which the agreement related, were engaged in business of a strictly private character, manufacturing and supplying pipe, an article susceptible of unlimited supply, on contracts let to lowest bidders, and the agreement or association was only intended and only operated to restrain competition as among defendants to the extent of effecting among them a fair division of the contracts secured by all, and was therefore neither a monopoly nor an attempt to monopolize any part of the trade and commerce among the states.

"*Fourth.* Because said contract or association did not unreasonably restrict competition among defendants, but the limitations were reasonable, in view of the interest of each defendant to avoid ruinous competition, the private character of their business, the customs of the trade in which they were engaged, and the character of the article manufactured by them.

"*Fifth.* Because said association or agreement, whether or not it was a monopoly, a contract in restraint of trade, or a collusion among bidders, and therefore void at common law, did not monopolize or restrain interstate trade or commerce, and was not therefore void under the Act of Congress of July 2, 1890.

"*Sixth.* Because if said contract is within the provisions of said Act, then the same is unconstitutional and void."

BRIEF.

I.

THE ASSOCIATION WAS NOT A MONOPOLY OR ATTEMPT TO MONOPOLIZE TRADE OR COMMERCE IN THE TERRITORY DESCRIBED IN THE PETITION, NOR A CONTRACT IN RESTRAINT OF TRADE OR COMMERCE AMONG THE STATES.

The specific charge as made by the petitioner is, that appellants were the only manufacturers of cast-iron pipe in the territory covered by thirty-six states, having capacity sufficient to supply the demand for such pipe, and that they had by unfair means driven out the few small concerns that were unable to compete with them, thereby practically securing the whole trade in the states named.

That this charge was untrue, in fact, is shown from the evidence cited.

NO MONOPOLY.

On the facts there was nothing that approached a monopoly.

Appellants represented but a small number of the manufacturers of cast-iron pipe, with a relatively small capacity. This pipe was so dealt in by the custom of trade that any corporation could buy all the pipe it needed without buying one single pound from any of appellants. There were other bidders on each contract let. No means were used to prevent others from bidding or competing for the trade.

"A monopoly in the prohibited sense," said Judge Jackson, "involves the element of an exclusive privilege or grant,

which restrains others from the exercise of a right or liberty which they had before the monopoly was secured. In commercial law, it is the abuse of free commerce, by which one or more individuals have procured the advantage of selling alone or exclusively all of a particular kind of merchandise or commodity to the detriment of the public. * * * This being, as we think, the general meaning of the term, as employed in the second section of the statute, an 'attempt to monopolize' any part of the trade or commerce among the states must be an attempt to secure or acquire an exclusive right in such trade or commerce by means which prevent or restrain others from entering therein."

In Re Green, 52 Fed. R. 104.

We insist that there is barely a relationship between the case at bar and those cases usually cited as condemning monopolies.

In Arnott v. Pittston Coal Co., 68 N. Y. 558; People v. North River Sugar Refining Co., 121 N. Y. 582; Central Salt Co. v. Guthrie, 35 Ohio St. 666; Croft v. McConoughby, 79 Ill. 346; Morris Run Coal Case, 68 Pa. St. 173; Gibbs v. Baltimore Gas Co., 130 U. S. 396; Richardson v. Buhl, 77 Mich. 632, and many others, there were certain marked considerations that show the distinction upon which we insist: In each case the public was directly interested in the combination alleged, either because the commodity in question was one of such prime necessity that its control affected the living and comfort of the general public, or because the business of defendants was of a public nature. It was also held in each case, either from the extent and character of the combination or the limited supply of the article, that prices could be fixed without competition and by simple dictation. There is no evidence in the record that the agreement of appellants contemplated the use of any means to prevent or restrain others

from entering into the trade in the territory described, or that they could have done so.

CONTRACTS IN RESTRAINT OF TRADE.

It was held by the Circuit Court of Appeals that no contractual restraint of trade is lawful unless the covenant embodying it is merely ancillary to a lawful contract, as between vendor and vendee; in other words, that every agreement limiting competition between traders, whether reasonable or not, is unlawful.

This conclusion does not accord with the reason of the rule or the weight of authority.

When the parties to a contract or association are engaged in a strictly private business, manufacturing or dealing in an article susceptible of unlimited production, and one not of prime necessity and in which the public is only indirectly, if interested at all, and when there is no effort or power to prevent competition, the question as to the legality of such a contract depends purely on its reasonableness under all the circumstances of each particular case.

In such cases public policy has conflicting interests to be adjusted. The freedom of contract is of paramount consideration and is not lightly to be interfered with.

Printing & Numerical Reg. Co. v. Sampson, L. R., 19 Eq. Cas., 462, 465.
Rousillon v. Rousillon, 14 Ch. Div., 351, 365.
National Benefit Co. v. Union Hospital Co., 45 Minn., 272.
Greenhood Pub. Pol., 116.

In Oregon Steam Navigation Co. v. Winsor, 20 Wall, 64, 68, Mr. Justice Bradley said:

"There are two principal grounds on which the doctrine is founded, that a contract in restraint of trade is void as

against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family."

It is very evident that the public is directly interested in the maintenance in a healthy condition of large business enterprises which support and maintain a great number of people. It is also true that in the present crowded condition of trade the public experiences no difficulty in finding a trader or manufacturer to buy from, and is, therefore, less interested in preserving competition.

In Oakdale Mfg. Co. v. Garst, 18 Rhode Island, 484, after citing and distinguishing the other class of cases, the court said:

"Undoubtedly there may be combinations so destructive of the right to buy and sell and to pursue their business freely that they must be declared to be void upon the ground of public policy. In such cases the injury to the public is the controlling consideration. But it does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is, therefore, illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties, and not injurious to the public. Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for mutual advantage which do not amount to a

monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule.

* * * * * * *

"Here there is no monopoly. Three of the four companies in New England in this line of manufacture agreed to unite; one inducement being to stop the sharp competition then existing between them. But even so, not only is the field open to the other company, equal in strength to either of these, but it is also open to competition from companies in other parts of the country, and to the formation of new companies. This is neither monopoly, nor such an approach to it as amounts to the same thing. It is the common occurence of a consolidation of firms. It is not illegal, on the ground of reducing competition."

This case is in accord with Tode v. Gross, 127 N. Y., 480; Shrainka v. Scharringhausen, 8 Mo. App., 522; Beal v. Chase, 31 Mich., 521; Dolph v. Troy Laundry Machine Co., 28 Fed. R., 553; 138 U. S., 620; Kellogg v. Larkin, 3 Pinney (Wis.), 123; Dueber Watch Case Manufacturing Co. v. Howard, 35 U. S. App., 16; Central Shade Roller Co. v. Cushman, 143 Mass., 353; Diamond Match Co. v. Roeber, 106 N. Y., 473; Leslie v. Lorillard, 110 N. Y., 519. This subject has been so elaborately discussed in other cases recently determined by this court that we deemed it unnecessary to cite further authorities on the proposition.

As said by the court in National Benefit Co. v. Union Hospital Co., *supra*, "excessive competition is not now accepted as necessarily conducive to the public good. The fact is that the early common law doctrine in regard to contracts in restraint of trade largely grew out of the state of society and business which has ceased to exist, and hence the doctrine has been much modified, as will be seen by comparison of the early English cases with modern decisions, both English and American."

But this Court in Gibbs v. Baltimore Gas Co., 130 U. S. 396, and United States v. Freight Association, 166 U. S. 290, treat the test of reasonableness as applicable to cases limiting competition where the agreement is between parties engaged in private business.

After quoting from the opinion of the Court in the Gibbs case, Mr. Justice Peckham in the last case said:

"The above extract from the opinion of the Court is made for the purpose of showing the difference which exists between a private and a public corporation—that kind of a public corporation which, while doing business for remuneration, is yet so connected in interest with the public as to give a public character to its business, and it is seen that while, in the absence of a statute prohibiting them, contracts of private individuals or corporations touching upon restraints in trade must be unreasonable in their nature, to be held void, different considerations obtain in the case of public corporations like those of railroads, where it well may be that any restraint upon a business of that character as affecting its rates of transportation must thereby be prejudicial to the public interests." * * *

He also quotes with approval from the dissenting opinion of Judge Shiras, as follows:

"By reason of this marked distinction existing between enterprises inherently public in their character, and those of a private nature, and further by reason of the difference between private persons and corporations engaged in private pursuits, who owe no direct or primary duty to the public and public corporations created for the express purpose of carrying on public enterprises and which, in consideration of the public powers exercised in their behalf, are under obligation to carry on the work intrusted to their management primarily in the interest and for the benefit of the community, it seems clear to me that the same test is not applicable to both classes of business and corporations

in determining the validity of contracts and combinations entered into by those engaged therein."

In the dissenting opinion delivered by Mr. Justice White, it is said:

"In conclusion, I notice briefly the proposition that, though it be admitted that contracts, when made by individuals or private corporations, when reasonable, will not be considered as in restraint of trade, yet such is not the case as to public corporations, because any contract made by them which is in any measure in restraint of trade, even when reasonable, is presumptively injurious to the public interests, and therefore invalid."

The test of reasonableness is not confined to collateral covenants, as held by the Circuit Court of Appeals, but as to whether it shall be applied depends on the nature of the business in which the parties to the agreement are engaged.

Cases still arise involving the validity of restraints imposed on individuals as part of the consideration of sales made by them, but in these the public can have but little interest. When an individual has sold his property or business the community at large can have no more interest in his freedom from restraint than in that of any other person having the same means. Public policy is mostly concerned with the parties in business and the restraints they impose on each other. Hence to limit the test of reasonableness to contracts collateral to sales denies its only important application.

It cannot be disputed that the supply of cast-iron pipe is largely in excess of the demand, and that on account of the peculiar manner in which this pipe is purchased a few of the present manufacturers could fill all the contracts offered; that the measure of restraint as provided by the association was to prevent a ruinous competition and effect a division of the work secured by appellants, and for no other purpose; that the custom peculiar to this trade of purchasing all pipe

by biddings after advertisement prevented the establishment of an ordinary market and pitted all manufacturers against each other on every contract let; that, in the main, all this pipe was bought by other corporations. It is apparent, if not admitted, that the association of appellants saved them from the results of ruinous competition, and that the public has been benefitted, unless its interest would have been subserved by the bankruptcy of some or all of these companies.

THE ASSOCIATION NOT ILLEGAL OR IMMORAL.

But instead of being the odious thing as argued, and one from which an informer should reap a harvest for betrayal of confidence, the association in question violates no principle of morals or law, and is not new or of unusual character. It is but a division of a certain portion of the gross receipts of each as a means of self-preservation. Aside from the doctrine of *ultra vires*, it is no more immoral or illegal than an ordinary partnership.

It has been held that where the purpose of a contract is *bona fide* to prevent the ruinous consequences of competition, an agreement to divide a portion of the gross receipts among trading firms is not illegal, and does not create a partnership.

Eastman v. Clark, 53 N. H., 276.
Mayrant v. Marston, 67 Ala., 453.
Fay v. Davidson, 13 Minn., 491.
3 Kent, p. 25, notes.

When the purpose is honest, and to save from destruction valuable property through reckless competition, there can be no legitimate complaint against pooling the earnings of rival manufacturers. Under proper circumstances and for lawful

purposes there may be a pooling of receipts without a partnership.

Traffic arrangements are not illegal even though they involve the constitution of a common fund, if the management of the business of each is kept distinct, and there is no delegation of corporate powers to a trust or central committee.

Ray on Contractual Limitations, Sec. 55, p. 238; Sec. 57, p. 244.
5 Thomp. Pri. Cor., Sec. 6399.
2 Spelling Pri. Cor., Secs. 972, 973.

Mr. Spelling says:

"When, as is sometimes the case, excessive competition has become, or is about to become, ruinous to private parties, which it is to the public interest to prevent rather than to encourage, anti-competitive contracts are reasonable and should be upheld. It is only when such contracts are publicly oppressive that they become unreasonable and should be condemned as contrary to public policy. 'All the cases, ancient and modern agree that a combination, the tendency of which is to prevent general competition and to control prices, is detrimental to the public and consequently unlawful.'"

* * * * * * *

"The law requires that the functions and duties of each corporation shall be performed by its duly constituted officers and agents without interference by those of other corporations. These requirements being met, the stockholders certainly may legally consent that the net profits of each corporation shall constitute a common fund to be shared between the corporations. But in passing upon the validity of such agreements it is important to bear in mind that the franchises and other delegated powers of the corporations cannot be transferred without legislative sanction.

"Where none of these objectionable features are made to appear courts will be very reluctant to interfere with the

agreement on the single ground that it constitutes the companies a copartnership."

By both the English and American authorities there is nothing illegal in an agreement effecting a division of territory, business or customers among competitors, and confining each in his operations to a particular territory, or excluding each from a certain district.

Wickens v. Evans, 3 Younge & Jervis, 318.
Nat. Benefit Co. v. Union Hospital Co., 47 Minn., 272.
Collins v. Locke, L. R., 4 App. Cas., 674.
Harriman v. Menzies, Cal., 1896.
Hubbard v. Miller, 27 Mich., 15.

II.

The Agreement did not Restrain Inter-State Trade or Commerce.

If the association was illegal, whether as a monopoly or a contract in restraint of trade, it did not restrain interstate trade or commerce as prohibited by the Trust Act.

We quote that part of the opinion of the Court of Appeals in which is stated the conclusion of law and fact making the association a contract in restraint of interstate commerce.

"The second question is whether the trade restrained by the combination of the defendants was interstate trade. The mills of the defendants were situated, two in Alabama, two in Tennessee, one in Kentucky and one in Ohio. The invariable custom in sales of pipe required the seller to deliver the pipe at the place where it was to be used by the buyer, and to include in the price the cost of delivery. The contracts, as the answer of the defendants avers, were invariably made after public lettings at the home, and in the state, of

the buyer. The pay territory, sales in which it was the professed object of the defendants to regulate by their contract of association, included thirty-six states. The cities which were especially reserved for the benefit of the defendants were Atlanta and Anniston, reserved to the Anniston mill, in Alabama; New Orleans and Chattanooga, reserved to the Chattanooga mill, in Tennessee; St. Louis and Birmingham, reserved to the Bessemer mill, in Alabama; Omaha, reserved to the South Pittsburg mill, in Tennessee; Louisville, New Albany and Jeffersonville, reserved to Dennis Long & Co., of Louisville; and Cincinnati, Newport and Covington, reserved to the Addyston mill, in Ohio. Under the agreement, every request for bids from any place, except the reserved cities, sent to any one of the defendants, was submitted to the central committee, who fixed a price, and the contract was awarded to that member who would agree to pay for the benefit of the other members of the association the largest 'bonus.' In the case of the reserved cities, the successful bidder having been already fixed, the association determined the price and bonus to be paid. The contract of association restrained every defendant except the one selected to receive the contract from soliciting (in good faith) or making a contract for pipe with the intending purchaser at all, and restrained the defendant so selected from making the contract except at the price fixed by the committee. In cases of pipe to be purchased in any state of the thirty-six in pay territory, except four, each one of the defendants, by his contract of association, restrained his freedom of trade in respect to making a contract in that state for the sale of pipe to be delivered across state lines: five of them agreeing not to make such a contract at all, and the sixth agreeing not to make the contract below a fixed price. With respect to sales in Ohio, Kentucky, Tennessee and Alabama, the effect of the contract of association was to bind at least three, sometimes four, and sometimes five, of the defendants not to make a contract at

all in those states for the sale and delivery of pipe from another state; and if the job were assigned, as it might be, to one living in a different state from the place of the contract and delivery, its effect would be to bind him not to sell and deliver pipe across state lines at less than a certain price. It thus appears that no sale or proposed sale can be suggested within the scope of the contract of association with respect to which that contract did not restrain at least three, often four, more often five, and usually all, of the defendants in the exercise of the freedom, which but for the contract would have been theirs, of selling in one state pipe to be delivered from another state at any price they might see fit to fix. Can there be any doubt that this was a restraint of interstate trade and commerce?"

After stating the principle decided in Robbins v. Taxing Dist., 120 U. S., 489, Emert v. Missouri, 156 U. S., 296, and kindred cases, it is concluded:

"If, then, the soliciting of orders for, and the sale of, goods in one state, to be delivered from another state, is interstate commerce in its strictest and highest sense,—such that the states are excluded by the Federal Constitution from a right to regulate or tax the same,—it seems clear that contracts in restraint of such solicitations, negotiations and sales are contracts in restraint of interstate commerce."

Record, 319, 320.

ERRONEOUS CONCLUSIONS OF FACT.

We respectfully insist that the decree is founded on a misconception of the facts. *The contract only provided that there should be, on each contract, a bonus for division, and the method of fixing it.* As to general business it made no selection of the company to bid on any contract. As each contract arose the member agreeing to the highest bonus for division

became the selected bidder by virtue of his agreement as to the bonus. In other words, the *direct* purpose of the agreement was to *fix the bonus*, the selection of the member to make the bid resulting *incidentally*.

The effect was different in the few cities known as "reserved cities," as to which there was a concession that certain members should have a right to bid on the contracts these cities might offer. *No article of interstate commerce was the subject of this agreement.*

The selection of one of appellants to make the bid was not the same as "five of them agreeing not to make such a contract at all, and the sixth agreeing not to make the contract below a fixed price." Nor was "the effect of the contract of association to bind at least three, sometimes four, and sometimes five, of the defendants not to make a contract at all in those states (where the plants were located) for the sale and delivery of pipe from another state."

If there had been no association, only one company, the lowest bidder, could secure the contract. All others were excluded as the result of one making the lowest bid. As but one member of the association could in any event secure the contract, the selection of that member could not operate to restrain five or any number of others from securing it. It was but a selection of the one, and not an exclusion of any others.

As the bonus applied to all contracts it would result, if in fixing a bonus in any state where a plant was located that a company from another state was selected, that interstate commerce was promoted, if the argument quoted is sound.

If the whole business of appellants was interstate commerce, then the selection of any member would result in this character of commerce—the only effect being simply a selection.

When the member to bid is agreed on, the others are obligated not to make a lower bid and to aid if neccessary in

securing the contract. Then comes the letting of the contract at which all pipe companies are invited to bid. Only one member of the association bids against the outside competion. If this bid is the lowest the contract is awarded in terms and on conditions usually prescribed by some municipal ordinance. To this contract the other members are not parties in any sense. The pipe to be subsequently manufactured, and that might or not be shipped from another state, is the exclusive property of the selling company. It continued the property of this company while it was being manufactured, during the transportation and until delivery and receipt at the place where the contract was let.

The contract was awarded and executed under purely local regulations. In performing it a *transportation* from one state to another would subsequently result if the pipe was manufactured in a state other than that in which it was to be delivered.

To this transportation, if it should take place, and to the pipe that might be transported, the contract of association had no relation whatever. *Its whole purpose was accomplished when the bonus was was fixed; it had ceased to operate even indirectly when the contract was awarded.*

It was an agreement regulating the conduct of the parties at local lettings and confined altogether to sellers. While it is true that the individual members were engaged in general trade, the association itself was not engaged in any kind of trade.

We insist, therefore, that the compact of association did not and was not intended to directly restrain interstate trade or commerce.

ERRONEOUS APPLICATION OF LAW.

But the cases cited do not warrant the conclusion reached. The question decided in Robbins v. Taxing District is thus

stated by Mr. Justice Bradley: "Whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein."

Robbins, as the agent of Cincinnati merchants, was soliciting in Memphis sales of goods to be shipped from Cincinnati to Memphis. This was his only business. The tax on him was a tax on this business of soliciting the sale of goods to be transported from one state to the other, and was therefore a direct burden on or regulation of interstate commerce and might become a prohibition.

The act in question was held illegal because it directly imposed a tax on interstate commerce.

In Asher v. Texas, 128 U. S. 129, the Robbins case was reaffirmed and the doctrine again announced "of the unconstitutionality of local burdens imposed upon interstate commerce by way of taxing an occupation directly concerned therein."

Where persons are soliciting the sale of goods on behalf of individuals or firms doing business in another state, their business is a part of interstate commerce.

Stoutenburgh v. Hennick, 129 U. S. 148.

The result of these authorities is that no state can levy a tax on interstate commerce in any form, whether by imposing duties on the transportation of articles of that commerce or on the business of carrying on such commerce.

But the rule is different where the business taxed is general.

In Ficklen v. Shelby County, 145 U. S. 21, it was held: "Where a resident citizen engages in general business subject to a particular tax the fact that the business done chances to

consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the constitution."

The business of the soliciting agent in this case was general and could be taxed, although it include interstate trade. The tax in this case was not a tax on interstate commerce as in the Robbins case.

Brennan v. Titusville, 153 U. S. 289, 307.

In the Robbins case the sales solicited related only to goods to be transported from Cincinnati to Memphis; the sales if made could only be executed by this transportation, which was necessarily in the contemplation of the parties, and was the direct effect and purpose of the contracts solicited. These contracts, as well as the business of the party soliciting them, were parts of interstate commerce, and could not be taxed or prohibited by the States.

But are contracts advertised to be let by municipal or other corporations a part of interstate commerce? No particular seller or source of supply is in contemplation. Any one may bid who can manufacture or have manufactured the character of pipe called for. If the awarding of the contract results ultimately in a transportation, it is by chance and not by design. Nor is the character of the contract to be awarded changed by the fact that some or all the bidders may be non-residents. The advertisements call for bids on pipe of certain specifications, to be delivered at the place where to be used. There is no evidence that the bids made are in the nature of propositions to manufacture and transport the pipe from another state. There could be no evidence of the nature of the bids which, it is decreed, the contract illegally restrained appellants from making. The bidders might or

might not contemplate transportation. But if they did, that would not make the pipe to be thereafter manufactured an article of interstate commerce.

Or, looking at it in another view: The state of Ohio could impose a tax on the firm represented by Robbins, although the business of that firm included the very sales solicited by him and which could not be prohibited by the state of Tennessee. And the states can tax the business of all wholesale firms engaged generally in trade, and this right is "not affected by the variable and adventitious results of business from year to year." So a contract between traders engaged in general business, and fixing a bonus to restrain their competition in all sales that may arise, is not a restraint on interstate commerce, although as a result of their business from year to year, the contract may affect interstate commerce. Such result is not direct but incidental.

Conceding the legal proposition assumed by the Court of Appeals, that a contract between traders restraining them from soliciting interstate trade stands upon the same footing, and is as obnoxious to the interstate commerce clause of the constitution as a law of a state regulating or prohibiting interstate commerce, still the case is not supported by the authorities cited, because appellants were not engaged in interstate trade, and their contract of association related to their general business, and if in working it out it operated on interstate commerce, it was by chance, *and because appellants subsequently engaged in such commerce.*

A person who is taxed by the state or restrained by his own contract has just the same right to engage in interstate trade as the person who is free from the tax or restraint.

CONTRACTS AS OBSTRUCTIONS TO INTER-STATE COMMERCE

But we deny that the commerce clause of the constitution applies alike to the contracts of parties and to state legislation.

In construing this clause of the constitution this Court in State Freight Tax Case 82 U. S. 32, said: "A power to prevent embarrassing restrictions by any state was the thing desired." And in the Robbins case Mr. Justice Bradley expressed the same idea. "In the matter of inter-state commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems." Whenever, wherever or however state legislation directly interferes with the free flow of commerce from one state to another, it conflicts with this provision of the constitution. If such legislation prevents the soliciting or making of contracts directly involving such commerce it is a regulation thereof, an interference therewith and therefore inoperative

All contracts and negotiations which have been held to constitute a part of interstate commerce are so only in the sense that they can not be prohibited by the states. This is the end of the regulating power of Congress. So far as concerns the parties to the contracts or negotiations, they are left free from the interference of either national or state law.

It is substantially a different thing whether a state prohibits a person from making a contract or whether the person by his own contract restrains himself. In the one case there is prohibited the freedom of contract, and if the subject matter is interstate commerce the legislation is avoided by the commerce clause of the constitution; in the other there is exercised the liberty of contracting, even though by the

terms of the contract the right of buying or selling is in a measure restrained or regulated.

The commerce clause of the constitution only operates to guarantee, as against state legislation, the liberty of citizens in negotiating and making contracts between themselves for the transportation of commodities from one state to another, and for this purpose avoids legislation that in any manner burdens or regulates this liberty of the citizens; but it was not intended that that clause of the constitution should furnish the limit and measure of the citizen's rights in making or negotiating these contracts.

Interstate commerce existed before the adoption of the constitution and exists now under the same laws. All commercial contracts are made under and rest on the laws of the states. Their right to be so made is the full purpose of the clause of the constitution in question. It is stated in Gibbons v. Ogden "that the constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world." We insist, therefore, that while there is guaranteed by the constitution the right of making the contracts, the contracts themselves, as between the parties thereto and affected thereby, are to be interpreted by the laws under which they are made and on which they rest.

The validity of state legislation regulating commerce is determined by this clause of the constitution; the validity of contracts between private parties, as they are not regulations of commerce, is determined by the laws under which they are made.

It was said by Mr. Justice Peckham in Hopkins v. United States, 171 U. S. 578, 602:

"We say nothing against the constitutional right of each

one of the defendants and each person doing business at the Kansas City stock yards to send into distant states and territories as many solicitors as the business of each will warrant. This original right is not denied or questioned. But cannot the citizen, for what he thinks good reason, contract to curtail that right? To say that a state would not have the right to prohibit a defendant from employing as many solicitors as he might choose, proves nothing in regard to the right of individuals to agree upon that subject in a way which they may think the most conductive to their own interests. What a state may do is one thing, and what parties may contract voluntarily to do among themselves is quite another thing."

In the same case it was argued in behalf of the complaint that an agreement among the members of the exchange to abstain from telegraphing in certain circumstances and for certain purposes, was an attempt to regulate the sending of messages. But it was said that an agreement among business men not to send telegrams in regard to their business in certain contingencies, where the agreement is entered into only for the purpose of regulating the business of the individuals, is not a direct attempt to affect the business of the telegraph company. The distinction is thus stated:

"The argument of counsel in behalf of the United States, that because none of the states or territories could enact any law interfering with or abridging the right of persons in Kansas or Missouri to send prepaid telegrams of the nature in question, therefore an agreement to that effect entered into between business men as a means toward the proper transaction of their legitimate business would be void, is, as we think, entirely unsound. The conclusion does not follow from the facts stated. The statute might be illegal as an improper attempt to interfere with the liberty of transacting legitimate business enjoyed by the citizen, while the agreement among business men for the better conduct of their

own business, as they think, to refrain from using the telegraph for certain purposes, is a matter purely for their own consideration. There is no similarity between the two cases, and the principle existing in the one is wholly absent in the other. The private agreement does not, as we have said, regulate commerce or impose any impediment upon it or tax it. Communication by telegraph is free from any burden so far as this agreement is concerned, and no restrictions are placed on the commerce itself."

Upon Congress is conferred the exclusive power to regulate commerce among the states. Nothing invades this exexclusive province of Congress unless it be something that directly regulates the commerce committed to its jurisdiction. State legislation is a regulation, and whenever it burdens or prohibits this commerce is unconstitutional and void. *But an agreement confined to six manufacturers, which simply fixes, as among themselves, the terms upon which they will engage in general commerce is not a regulation of any commerce, and especially not of that commerce which Congress alone may regulate.*

Contracts by which a few manufacturers stipulate among themselves not to bid on contracts except on certain terms and under certain regulations controlling the action of each, do not, as stated, *regulate* commerce; nor are they illegal, even though they fix prices at which the parties must sell their goods.

Deuber Watch Case Mfg. Co. v. Howard, 35 U. S. App. 16.

Macauley v. Tierney, 33 At. L. R. 1-4.

Manufacturing Co. v. Hollis, 54 Minn. 223.

If such agreements are illegal they are so only because in conflict with the principles of the law on which they are founded.

SCOPE OF INTERSTATE COMMERCE.

But even if we admit that such contracts *regulate* commerce, when do they come within the jurisdiction of Congress?

"It is the stream of commerce flowing across the states, and between them and foreign nations, that congress is authorized to regulate. To prevent direct interference with or disturbance of this flow alone, was the power granted to the federal government. Congress has, therefore, no authority over articles of merchandise or their owners, or contracts or combinations respecting them, which have not entered into this stream, or having entered, have passed out. It may prohibit and punish all acts that are intended and directed to restrain or otherwise interfere with or disturb such commerce, but it can go no further."

U. S. v. E. C. Knight Co., 60 Fed. R. 306, 309.

Interstate commerce and the regulating power of Congress commences when the commodity is delivered for transportation to a common carrier and ceases when the commodity is delivered at its destination and becomes mingled with the general mass of property in the other state.

Brown v. Maryland, 12th Whea. 419.
State Frt. Tax Case, 82 U. S. 272.
Coe v. Errol, 116 U. S. 225.
Kidd v. Pearson, 128 U. S. 128.
Williams v. Missouri, 91 U. S. 275.

The fact that an article is manufactured for export does not of itself make it an article of commerce, and the intent of a manufacturer does not of itself make it an article of interstate commerce, or determine the time when the article passes from the control of the state and belongs to commerce.

This is so ruled in Coe v. Errol, 116 U. S. 517-525, in which the question before the court was whether certain logs, cut at a place in New Hampshire and hauled to a river town for the purpose of transportation to the state of Maine, were liable to be taxed like other property in the state of New Hampshire. Mr. Justice Bradley, delivering the opinion of the court, said:

"Does the owner's state of mind in relation to the goods (that is, his intent to export them and his partial preparation to do so), exempt them from taxation? There must be a time when they cease to be governed exclusively by the domestic law and begin to be governed by the national law of commercial regulations. And that moment seems to be a legitimate one when they commence their final movement from the state of their origin to that of their destination."

U. S. v. Knight, 156 U. S., 13-14.
Coe v. Errol, 116 U. S., 517-525.
In Re Green, 52 Federal Reporter, 104-114.

The precise point of time when the goods pass from under the protection of the national law of commercial regulations and come under the protection of domestic law where shipped is, of course, when they become commingled with the mass of property in the latter state, and this is when they arrive at their place of destination for use or trade before being landed, unloaded or sold.

But contracts to be a part of interstate commerce must be connected with or relate to the transportation of an article of commerce from one state to another, and contracts not so connected or related are no part of interstate commerce in the constitutional sense that they may be regulated by Congress.

The case of Paul v. Virginia, 8 Wall, 183, fully illustrates this principle.

Mr. Justice Field, in delivering the opinion of the court in that case, said:

"The policies are simple contracts of indemnity. They are not articles of commerce in any proper meaning of the word * * * They are not commodities to be shipped or forwarded from one place to another. They are like personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect —are not executed contracts until delivered by the agent in Virginia. They are then local transactions and are governed by local law. They do not constitute a part of the commerce between the states any more than the purchase and sale of goods in Virginia by a citizen of New York, while in Virginia, would constitute a portion of such commerce."

It follows from these cases that if a citizen of Tennessee goes to New York, and while there buys a stock of goods, the contract is no part of interstate commerce, and this is so, although at the time he purchased them, he intended to ship them to the State of Tennessee, because the owner's state of mind or his intention to ship the goods do not make them a part of interstate commerce, as before shown, until delivered to the common carrier for shipment. Therefore the contract of purchase, which in point of time, is anterior to the delivery of the articles bought to the common carrier, and which has no connection with or relation to the transportation of the goods, is not and cannot be a part of interstate commerce.

On the other hand it is equally well settled that if a citizen and resident of the State of Tennessee ship a carload of coal to the State of New York for the purpose of selling it there—on arrival at its destination, the place where it is to be sold or used, it becomes intermingled with the mass of property in that State, and passes from under the protection

and regulating power of Congress to the protection of the laws of the State of New York, and any contract of sale made of it would be wholly local and no part of interstate commerce.

Emert, v. Missouri, 156 U. S., 296.

In United States v. E. C. Knight Co., 156 U. S. 1, 16, after stating that the regulation of commerce was the prescribing of rules for carrying it on; that "the power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monoply;" and after determining, on the rule announced in Coe v. Errol and Kidd v. Pearson, "at what point in the course of the trade in or manufacture of commodities the statute may have effect upon them, or upon contracts relating to them", it was said:

"It was in the light of well settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monoply directly as such; or to limit and restrict the rights of corporations created by the states or citizens of the states in the acquisition, control or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof, should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanction or permitted."

And it was held that a monopoly in the manufacture of sugar did not come within the provision of the act, because it did not directly restrain or monopolize interstate commerce as defined.

Nor does the statute refer to contracts or combinations as such, or unless they directly restrain interstate commerce as defined in that case.

The contract of appellants makes no reference to shipments or transportation or to any specific pipe. It does not

relate to commodities of commerce, and especially to such commodities while subject to the regulating powers of Congress.

The association considered as a contract has no reference, either directly or indirectly, to commodities in the course of transportation or while subject to the regulating power of Congress. The whole object of the association was to regulate the conduct of its members at these local lettings. Its operation ended there. If interstate commerce followed or resulted from the local lettings, it was in no way controlled or restrained by the association, which had already spent its force when the contract was let.

Again, if the association was more than a mere rule of conduct as stated, and had reference to commerce, it was to commerce *generally* and not to any special commerce, either domestic or interstate. These observations include as well the provisions relating to "reserve cities," as to which, if there was any restraint, it was partial and limited, and neither more direct than that caused by the sugar monopoly, which prevented trade not only with a few, but with all cities.

As to the question of a monopoly, it was charged that defendants had effected a complete control of the trade in what was described in the bill as "pay territory," or the thirty-six states named. This included most of the United States It was argued that because some of defendants had an advantage in freight rates in some limited localities that this proved the charge as made. But this was not charged in the petition.

In the very nature of things, and from the situation of the parties, there could have been no monopoly on account of advantages in freight rates, which would be necessarily very limited in effect and nothing like co-extensive with the territory specified.

Because the total amount of bonuses to be paid on every contract secured was determined by the amount of actual shipments, in no manner restrained or affected the shipments. Long before there was any shipment at all, the contract, to the securing of which alone the rules of the association related, had been secured and passed from the control or operation of the organization, to the control of the member securing it. The organization concerned itself only with contracts to be let, and not with contracts beyond the letting or any shipments that might follow. The shipment was in no manner controlled by the association, but by the contract secured by the particular member.

The association itself could not operate or be applied either to domestic or inter-state commerce without the intervention of a contract between one of the defendants and a consumer, and this contract is necessarily interposed between appellants as an association and the shipment or transportation of the pipe, which is necessary to make the transaction inter-state commerce; consequently the contract of association, so far as it affects the inter-state commerce involved, would be indirect.

A contract to directly affect inter-state commerce must itself relate to that commerce, and could not do so if it required the intervention of a second contract to reach its object.

It is asked in this case that appellants be declared guilty under the act of Congress, because it is alleged that they are members of an association that restricts their right to sell to citizens of other states, and because the association as a contract stands in the way of making other contracts that would be parts of inter-state commerce if made. The case would be the same if instead of alleging a combination or association, appellee had charged the existence of a partnership among appellants having reference to general commerce.

Could the association, or could a partnership with the same objects, be dissolved in order that other contracts might be made that might result in inter-state commerce?

III.

IF CONSTRUED TO REFER TO AND INCLUDE SUCH CONTRACTS AS EXISTED BETWEEN APPELLANTS, THE TRUST ACT OF JULY 2, 1890, IS VOID, (1) BECAUSE NOT AUTHORIZED BY THE COMMERCE CLAUSE OF THE CONSTITUTION, AND (2) BECAUSE IN CONFLICT WITH THE FIFTH AMENDMENT TO THE CONSTITUTION.

FIRST.

Under the Commerce Clause Congress has only the exclusive power to regulate inter-state commerce.

Nothing can be an invasion of this exclusive power unless it amounts to a regulation or such a direct obstruction as prevents regulation. This, we think, is established by cases already cited.

The government of the Union derives its powers from the people, and exercises them on and for the benefit of the people; and within the sphere of its delegated powers the laws of the United States are by express declaration, and ought to be, the supreme law of the land. But to be constitutional an Act of Congress must be authorized, as has been frequently decided.

The Fourteenth Amendment provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person, of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Congress being authorized by appropriate legislation to enforce this amendment, passed an act in effect declaring

that all persons of color should have the same privileges and accommodations enjoyed by others in all inns and public conveyances. It was held by this court that the act was unconstitutional, and the power conferred on Congress was thus defined:

"To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. * * * * *

"Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, state laws, or state action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law

regulative of all private rights between man and man in society. It would be to make Congress take the place of the state legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a state to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection." * * * *

"If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty and property? If it is supposable that the states may deprive persons of life, liberty and property without due process of law (and the amendment itself does suppose this), why should not Congress proceed at once to prescribe due process of law for the protection of everyone of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances and theatres? The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the states are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon congress to enforce the prohibition, this gives congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

Civil Rights Cases, 109 U. S., 3, 11, 13, 14.

This amendment as construed authorized no law making the acts of individuals criminal.

While it is said that the commerce clause differed in this respect from the amendment under consideration, there was no decision to this effect, and especially not as to the extent of the difference. And the principle of that case and others does limit the power of congress to the regulation of that commerce, which before the adoption of the constitution and since, had an independent existence; and it leaves the whole police power on the subject in the states.

As said in Gilman v. Philadelphia, 3 Wall, 713, 725, quoted by Mr. Justice Brewer In Re Debbs, "Wherever 'commerce among the states' goes, the power of the nation, as represented in this court, goes with it to protect and enforce its rights."

It is the free flow of the streams of commerce among the states that Congress is empowered to protect. Every law of the state which, by taxation or otherwise, burdens or restricts this commerce or discriminates against it, is void as an invasion of the exclusive power of Congress. And there is another large class of subjects on which the power acts directly.

The channels through which this commerce flows, whether the natural or artificial ones, are subject to the exclusive control and regulation of Congress, because as essential to its existence as protection against hostile legislation.

All navigable rivers and interstate highways, such as railroads, and the means of interstate communication, as telegraph and telephone lines, are and should be subject alone to this regulation and control, otherwise Congress would be powerless to regulate commerce or to prevent its paralysis by independent agencies.

When the mob was organized in Chicago of such proportions that it could and did, by violent means, check all that

commerce which flowed to, from and through that great city, if the National government had not the power to remove the obstruction, then similar means might have been used in all other towns and cities, for any length of time, and all interstate commerce effectually blocked.

Of the bill entertained in the Debbs case it was said. "The scope and purpose of the bill was only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried." But "the right of any laborer or any number of laborers, to quit work was not challenged."

In Re Debbs, 158 U. S. 564, 598.

Congress may therefore legislate with reference to the acts of individuals that actually obstruct transportation from one state to another, but to what extent is not decided.

Whether power under this clause is exercised to prohibit state action, or to restrain mob violence, the purpose in either case is the same—to protect the freedom of the citizen in carrying on commerce among the states.

But we insist that notwithstanding the power of Congress to protect commerce against legislation that regulates it, and against the acts of individuals that actually obstruct its highways, there is still no right under the commerce clause of the constitution to control the conduct of individuals in making, or refraining from making, or in limiting by agreement their power to make, the contracts which originate this commerce. There is protected the right to make contracts of purchase or sale, under and according to the laws of any state, and there is guaranteed from actual obstruction, whether by the state or individuals, the transportation incident thereto.

But these contracts are always made under the law of the state, which is always the *lex loci contractus*, and the test of their validity. No other law can determine the capacity of

the parties, the terms of their contracts or the extent to which they may bind themselves.

"Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made."

Scudder v. Union Nat. Bank, 91 U. S., 406, 413.

2 Par. on Contracts (8 ed.), p. 576-7.

It was not the intent of the commerce clause of the Constitution that Congress should take possession of the subject of contracts, supersede and displace state legislation on the same subject, and furnish a system of laws as the foundation of all commercial contracts.

This is much beyond a power to protect the right of making contracts under state laws, or to protect that commerce which the Constitution found in existence. It is an exercise of the police power which under the Constitution remains in the states.

Cooley's Constitutional Limitations, p. 706 and cases cited.

To illustrate: Any six merchants of Memphis might have bound themselves by agreement to buy all their goods from factories or wholesale merchants in Tennessee, and not to buy from firms outside the state. Such agreement might have been made for the express purpose of favoring domestic trade. Or they might have agreed to buy from St. Louis instead of Cincinnati. They could also for their mutual good have bound themselves by contract not to buy from any drummers soliciting sales of goods to be transported from other states without consulting and agreeing among themselves as to the prices to be offered. For the same reason any six wholesale shoe houses, although doing business in different states, could agree not to sell at all for transportation into certain other states, or not to sell except at prices to be agreed on whenever an order was received. They could

agree to discriminate in favor of domestic commerce. The direct effect of these agreements would be to keep such parties out of inter-state commerce and to that extent restrain it, but inasmuch as there is no obligation under the National Constitution to enter it, there could be no violation to agree to remain out or only to engage in it on certain terms.

It may also be said that if a merchant in Tennessee agrees to sell goods to be transported to New York, or to buy goods on order to be shipped from there, he could refuse to deliver or decline to receive them without violating any law of the Union Congress could not by statute provide for damages on breach of such contract or for their specific performance.

Congress may and has exercised the police power over the *instruments* or *agencies* of interstate commerce, and, in doing so, may prescribe the regulations in detail and operate directly on individuals. It can authorize the incorporation of such instrumentalities as it has done. But it is not granted the right by any clause of the constitution to provide by law for licensing trade or traders, for regulating the business relations between man and man, or for determining the legality of the business arrangements or business methods of those who may engage in trade. All these subjects of legislation fall within the police power of the states.

United States v. DeWitt, 9 Wall, 41.
License Tax Cases, 5 Wall, 462.
In Re Rahrer, 140 U. S. 545.
Paterson v. Kentucky, 97 U. S. 501.

Is must follow, therefore, that whether a particular business, or combination in business, or monoply or contract in restraint of trade, is lawful or illegal, depends on an application and interpretation of the police power of the states.

If a person is engaged in shipping goods from one state to another under contracts secured for that purpose, it is not

within the province of Congress to determine the legality of the methods by which the contracts were secured or whether the trader was engaged in business under an illegal combination. If so it could not be said that Congress can not deal with monopolies as such, because to prohibit them from making contracts, and the interstate shipments incident thereto, is equivalent to declaring them illegal.

The state or municipal law is the test of the validity of these contracts and all others in which the parties combine or form an association for the control of their own business or conduct only, and create no restraint or obstruction to the flow of interstate commerce except what results from the exercise of their option to refrain from it. And this must be true even though there is direct restraint against making contracts that would, if made, be parts of interstate commerce, or against making them except under agreed conditions and at fixed prices. Such contracts are wholly unlike in their effects, legislation which prohibits them.

Hopkins v. United States, *Supra.*

If such contracts are condemned by the Trust Act, then this statute, as already stated, does deal with monopolies and contracts as such, and is an invasion of the reserved rights of the states.

United States v. E. C. Knight Co., 156 U. S., 1.

Only those laws of Congress made in pursuance of the Constitution are valid. Hence if the contract of appellants, by which they agreed to restrain themselves or to regulate their rights in making contracts to manufacture pipe to be transported into other States, is within the terms of the Trust Act, that act is unconstitutional unless the commerce clause is the source from which individuals derive their power to make commercial contracts.

The act so construed is not appropriate to the regulation of interstate commerce, which exists in full freedom whether

or not private traders are by their contract directly restrained from participating in it, or permitted to participate only on certain conditions.

It was held by the Circuit Court of Appeals that by force of the association formed by appellants "each one of the defendants, by his contract of association, restrained his freedom of trade in respect to making a contract * * * * for the sale of pipe to be delivered across state lines," and that this was illegal and criminal under the Trust Act.

We might admit, as held by the Circuit Court of Appeals, "that an agreement between intending bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition is a fraud upon the intending vendor or contractor, and the ensuing sale will be set aside."

But the association of appellants was for the purpose of fixing bonuses, and applied to all the business of each. It only resulted incidentally that it regulated the conduct of each at lettings. And it may also be said that unless a contract limiting competition is of itself unreasonable and void, it is not made so because all purchasers choose to buy pipe after advertising for bids. The principle stated applies only to sales required by law to be made in that manner.

But aside from the rules which distinguish the agreement of appellants from a combination between "intending bidders" at a public sale, and which distinguish the purchase of pipe at the customary lettings from public sales, can it be said that under the commerce clause of the Constitution Congress would be vested with the power to regulate public sales and declare criminal the conduct of bidders thereat? Not only so, but to furnish the purchaser a right to damage if the contract is secured and performed by the transportation of pipe from another state? To so hold would displace the whole police power of the state, which simply avoids the contract at the option of the purchaser, and substitute therefor

a criminal statute providing also for a penalty in favor of the purchaser.

The United States Courts would either be compelled to furnish new remedies instead of those provided by local laws, or else to enforce the contract and bond as made under the municipal law of the state.

SECOND.

The Act of July 2, 1890, declares that parties making the contracts thereby prohibited are guilty of a misdemeanor and subject to a fine not exceeding $5,000.00, or to one year's imprisonment, or both, in the discretion of the court.

Is also provides that any person injured in his business or property, by reason of the contracts forbidden or declared unlawful, shall recover three fold the damage by him sustained.

If this statute includes the contracts of persons restraining competition among themselves in their private business, then it results that mere agreements among persons engaged in private business not to contract with others, or not to contract except on agreed terms, subjects such persons, (1) to criminal charges and penalties, and (2) to liability in three fold damages to parties with whom there might be no contract relation and who would be in no manner directly injured.

Or if these damages to purchasers only accrue in cases where they have made purchases from the manufacturers, then the effect of the statute is to avoid the manufacturer's rights in and under contracts voluntarily made and to substitute therefor criminal liability and heavy penalties.

In other words, manufacturers who agree among themselves not to sell to others or not to sell except on certain conditions, by this construction of the statute become crimi-

nals and subject to heavy fines and imprisonment, and liable in damages to parties whom they have not wronged, unless it be a wrong to restrain the right of contracting.

And if it be held not only that the statute includes such contracts but renders them illegal, whenever they restrain competition, whether the restraint is reasonable or not, then manufacturers are declared criminals, and liable in damages to third parties not injured, for making contracts necessary to save from destruction property that is their own used exclusively in their private business.

Now assuming that it was the purpose of the commerce clause of the constitution to vest in Congress a general police power, and to displace state legislation as the foundation of the right to make commercial contracts, the Trust act as construed would be unconstitutional under the Fifth Amendment.

This amendment is a limitation on the power of Congress.

Barrow v. Baltimore, 7 Pet. 243.

Even when exercised under the commerce clause.

Monongahela Nav. Co. v. United States, 148 U. S. 312.

We admit the principle that whenever property has been devoted to a public use, or clothed with a public interest, the government having jurisdiction may regulate the charges for its use; and this right of regulation in the government is inconsistent with the owner's freedom in contracting with respect to its use, or the price of its use.

The principle as announced in Munn v. Illinois, the leading American case on this subject, is, that "when the owner of property devotes it to a public use, he in effect, grants to the public an interest in such use, and must to the extent of the use, submit to be controlled by the public, for the common good, as long as he maintains the use."

The interest of the public in the use is the foundation and limit of the right to regulate the owner's control.

But under our system of government there is no power conferred "upon the whole people to control rights which are purely and exclusively private."

The distinction was thus expressed by Mr. Chief Justice Waite:

"Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all."

Munn v. Illinois, 94 U. S. 134.

In Budd v. N. Y., 143 N. Y. 517, 532, this court endorsed as sound and just the following principles affirmed by the Court of Appeals of New York:

"It affirmed that, while no general power resided in the legislature to regulate private business, prescribe the conditions under which it should be conducted, fix the price of commodities or services or interfere with freedom of contract, and while the merchant, manufacturer, artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammelled by burdensome and restrictive regulations, which however common in rude and irregular times, are inconsistent with constitutional liberty, yet there might be special conditions and circumstances which brought the business of elevating grain within principles which, by the common law and the practice of free governments, justified legislative control and

regulation in the particular case, so that the statute would be constitutional."

These decisions as explained and emphasized in the dissenting opinions limit the right of legislative control over private property and business to such property and business as is subject, on account of its uses, to public regulation.

But the full extent of governmental supervision over "rights which are purely and exclusively private," is thus stated by Mr. Justice Brewer in the dissenting opinion in Budd v. New York, 143 N. Y. 550.

"Surely the matters in which the public has the most interest, are the supplies of food and clothing; yet can it be that by reason of this interest the state may fix the price at which the butcher must sell his meat, or the vendor of boots and shoes his goods? Men are endowed by their Creator with certain unalienable rights: life, liberty and the pursuit of happiness; and to secure, not grant or create these rights, governments are instituted. That property which a man has honestly acquired he retains full control of, subject to these limitations: First, that he shall not use it to his neighbor's injury, *and that does not mean that he must use it for his neighbor's benefit;* second, that if he devotes it to a public use, he gives to the public a right to control that use; and third, that whenever the public needs require, the public may take it upon payment of due compensation."

There can be found no better statement of the constitutional limitations on governmental control of private business than in the dissenting opinion in these cases in this court and in the New York Court of Appeals in the Budd case.

In Dueber Watch Case Mfg. Co. v. Howard Co., 35 U. S. App. 16, the following principles are announced without dis-

sent. Lacombe, Circuit Judge for the Court of Appeals of the Second Circuit, said:

"Each one of the defendants had an undoubted right to determine for himself the price at which he would sell the goods he made, and he certainly does not lose that right by deciding to sell them at the same price at which a dozen or so of his competitors sell the goods which they make. Collectively the defendants owe no duty to anyone of their competitors to regulate the price they fix for their goods so as not to interfere with the price he fixes for his own.

* * * * * * *

"An individual manufacturer or trader may surely buy from or sell to whom he pleases, and may equally refuse to buy from or sell to anyone with whom he thinks it will promote his business interests to refuse to trade. That is entirely a matter of his private concern, with which governmental paternalism has not as yet sought to interfere, except when the property he owns is 'devoted to a use in which the public has an interest;' and such public interest in the use has as yet been found to exist only in staple commodities of prime necessity. 94 U. S. 113; Budd v. New York, 143 U. S. 517; 12 Sup. St. 468."

Judge Wallace placed his dissent upon the ground that the combination among defendants was designed to injure the business of a rival manufacturer, and thus unlawfully restrain interstate commerce. He recognized the right of defendants to agree among themselves as to their own sales if there had been no purpose to injure the trade of others.

A number of manufacturers, who are so situated that no single purchaser is under the necessity of buying from them, or can legally require them to sell to him, may certainly agree among themselves as to the control of their own property and business, and the prices on their line of goods, without being guilty of a criminal conspiracy, or incurring a liability for

damages to those whose only injury consists in the fact that their opportunity of purchasing is limited by this agreement among the manufacturers.

There is no purpose or tendency in such an agreement to injure any trade, or the business of any person, as is essential in criminal conspiracies. It would be no more criminal or illegal than if the same parties mutually agreed to retire from business altogether, or if certain ones, or all but one agreed to do so.

The weight of authority is that such agreements are valid and enforcible, even between the parties, if reasonable under the circumstances of the particular case.

Whether a contract of association is contrary to public policy and therefore illegal or criminal, depends, as we have attempted to show, on a construction of the municipal law under which it is made and which prescribes the limitations on the capacity and right of the parties to contract.

If the association is legal, according to this test, the contracts of its members are valid under the laws of the state, and the interstate transportation incident thereto can not be prohibited without impairing the the obligation of a legal contract. And whether or not an association of manufacturers and the contracts made by its members are invalid must be determined judicially.

We contend, therefore, that Congress regulates private business whenever by legislative enactment it declares void every combination or contract in restraint of trade among manufacturers engaged in selling for transportation into other states, and gives a threefold measure of damages to any person who has paid more for a commodity by reason of the association.

By this enactment, as it has been construed, Congress makes illegal, in their application to interstate commerce, a great number of business arrangements and contracts, that may be legal in respect to all the internal commerce of the states.

The Act, in so far at least as it declares illegal and criminal every such contract of citizens engaged in strictly private business, denies their rights of personal liberty, including the right to contract and control their own affairs as guaranteed by the Fifth Amendment of the Constitution.

And in requiring persons who have made such contracts to respond in threefold damages to parties to whom they have sustained no contract relation, or only such as were voluntarily and legally assumed, and on whom they have inflicted no actual injury, is a taking of property without due process of law, contrary to the same amendment.

Such power does not exist in Congress unless it be assumed that there is a right in the government under the constitution to regulate the business of all persons engaged in trade, or the manufacture of commercial articles.

To hold that congress may exercise the police power under the commerce clause, and that in doing so it may regulate the conduct, contracts, and business of citizens engaged in strictly private business, if they involve interstate commerce, is the assumption of a jurisdiction that includes most there is of importance in the affairs of the American people.

FOSTER V. BROWN,
FRANK SPURLOCK,
Attorneys for Appellants.

No. 251

Brief of Warrington

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed April 24, 1899.

The Addyston Pipe and Steel Company, Dennis Long & Company, Anniston Pipe and Foundry Company, South Pittsburgh Pipe Works, and Chattanooga Foundry and Pipe Works,

Appellants,

No. 251.] vs.

The United States,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR THE ADDYSTON PIPE AND STEEL COMPANY.

JOHN W. WARRINGTON,
Of counsel for Addyston Pipe and Steel Co.

PAXTON, WARRINGTON & BOUTELL,
Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1898.

The Addyston Pipe and Steel Company, Dennis Long & Company, Anniston Pipe and Foundry Company, South Pittsburgh Pipe Works, and Chattanooga Foundry and Pipe Works,
Appellants,

No. 269.] *vs.*

The United States,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR THE ADDYSTON PIPE AND STEEL COMPANY.

STATEMENT.

In view of the extended statement made by Mr. Brown and Mr. Spurlock, of the issues as made by the pleadings, and of the character and tendency of the evidence, we deem it unnecessary to do more in this regard than to state what we conceive to be the last analysis of the evidence.

The most that can be said of the arrangement which is made the basis of this action is that the appellants as owners of private manufacturing establishments, entered into a plan or scheme for profit with respect to the manufacture and sale

of an ordinary private product; that according to this plan some of the members would not manufacture for certain persons, or sell to them under certain conditions—they could not afford to; and in pursuance of a manifest purpose to supply at reasonable prices the fullest demand for cast-iron pipe, designated members from time to time so to supply this demand and required them respectively to set apart a certain sum of money to be divided in certain proportions among all the members.

It is to be observed in the first place that the members were not, as alleged in the bill, the only manufacturers, or even substantially so, within the territory in question; but on the contrary they were less than half, considered according to the capacity of the foundries, and, as we maintain, less than a third of their class in the country at large. And in the next place the manufactured article in question, cast-iron pipe, was not one devoted to any public use or in which the public had an interest, any more than it had in any other article of purely private manufacture. There was no provision, not even a suggestion, made in respect of the traffic rates of any common carrier. There was no provision or suggestion to reduce the manufacture of cast-iron pipe or to impair the demand for it or use of it, and its operation did not in fact do so. It is true that the plan under which the members were working at the time of the commencement of this cause looked to the fixing of prices from time to time in the future, according to the circumstances attending each particular sale and delivery of cast-iron pipe; that is to say, the plan provided for taking into account the cost of iron, labor and other items entering into the expense of manufacturing cast-iron pipe, together with the competition to be encountered. In short, aside from the union of the several interests, the plan contemplated only a resort to such means and advantages as are usually and rightfully employed by every manufacturer or merchant to protect his private busi-

ness interests. If the execution of the plan would affect interstate trade or commerce at all, that certainly was not the purpose or intent, and such effect was at most only indirect and remote.

The question then comes to this

Whether under the right of congress to regulate commerce among the states, citizens of a state, who are severally engaged in similar private business, may, without intending to restrain interstate trade or commerce, or to affect traffic rates, unite their interests under an arrangement which shall merely restrict fatal competition among themselves, but shall not restrict competition generally or even substantially, and so secure reasonable prices at which alone they are willing to dispose of their particular products or goods.

The far-reaching effects of a denial of such a right are both manifold and obvious. If manufacturers could not do so, then no sort of producers or merchants could enter into such an arrangement, no matter how small in number or how slightly or indirectly its execution would restrain interstate trade or commerce. Farmers could not do so in respect of wheat, corn or other cereals grown upon their separate farms for their own profit or even livelihood; for their farms might be so located, say in the Dakotas or other western states, that they would know when forming the plan that their products would be destined ultimately to reach the eastern states, not to speak of foreign countries. So of cotton growers. So of growers of livestock. So of persons engaged in commercial pursuits respecting any sort of articles intended only for private use or consumption.

We are thus brought to the necessity of reconciling the organic right or liberty of contract for the purposes of private gain on the one hand with the inhibition of the anti-trust act against the making of a "contract, combination, in the form of trust, or otherwise, or conspiracy, in restraint

of trade or commerce among the several states," on the other hand.

ASSIGNMENTS OF ERROR.

In the first place, we beg to refer to without repeating the assignments of error which were filed on behalf of the appellants with the petition for appeal. (R. 328.)

In the next place, we contend that errors occurred in the trial and decision in the Court of Appeals in the following respects:

(1) The court erred in holding the plan in question or its execution either in intent or effect as directly interfering with interstate trade or commerce.

(2) The court did not accord to the appellants the effect due to the purely private character either of their objects of being, or their undertakings; nor did it recognize in them those rights and privileges respecting private enterprise and profit which are guaranteed to all citizens of the several states. It did not in consequence yield to them the liberty of uniting their interests and doing business as an entirety through one of their members.

(3) The court did not distinguish between local trade and commerce on the one hand, and interstate trade and commerce on the other, when determining the object and effect of the plan upon which this cause is based; and, on the contrary, it employed what it conceived to be according to common law tests the direct effect upon local trade and commerce as also the direct effect upon interstate trade and commerce, whereas the latter effect, if any there were, was plainly indirect and remote.

(4) The court did not yield due consideration to the evils from which appellants were suffering, or to their intent in entering into the plan for the avoidance of those evils, when determining the effect of the plan upon interstate trade and commerce.

(5) The court failed to give due effect to the continued operations of greater competitors than all of appellants combined within the territory in dispute, as well as those of the still larger competitors located in other portions of the country, when determining the restriction, if any, which the disputed plan placed upon competition.

PROPOSITIONS.

First. Nothing can be denounced as falling within the inhibitions of the anti-trust act unless it can be shown affirmatively that its direct and necessary effect is to restrain interstate trade or commerce; it will not do to show merely that such effect is indirect or remote.

United States v. *Joint Traffic Association*, 171 U. S. 505, at 568.

Anderson v. *United States*, 171 U. S. 604, 616.

United States v. *E. C. Knight Co.*, 156 U. S., at p. 12.

Hopkins v. *United States*, 171 U. S. 578, 592, 594.

N. Y. L. E. & W. R. R. Co. v. *Pa.*, 158 U. S. 431, 439.

Second. Since no article of commerce can be regarded as within the national power of commercial regulation until its final transportation from the state of its origin has commenced(*a*); and since this power of regulation ceases the moment such article reaches and is put into condition for use or sale as part of the general mass of property at its destination(*b*); it inevitably follows that whilst said article is so without the regulating power of congress, as aforesaid, it is, as regards that power, within the exclusive dominion and control of its owners, and they may *as between themselves* make any arrangement they choose looking to either the immediate or ultimate sale of the article generally, that is to say, both within and without their own state according as opportunity

may arise, no matter what legal definition, whether monopoly or otherwise, may be rightfully employed to describe the arrangement. Such arrangement, as well as any determination reached by the owners *themselves* in its execution, does not involve intercourse with a stranger as purchaser or otherwise, and consequently is not trade or commerce at all—certainly not interstate trade or commerce(*c*).

(*a*) *Coe* v. *Errol*, 116 U. S. 517, 527–8.
Turpin v. *Burgess*, 117 U. S. 504, 506–7.
Kidd v. *Pearson*, 128 U. S. 1, 24–5.
United States v. *Freight Association*, 166 U. S. 290, at 325–6.

(*b*) *Brown* v. *Huston*, 114 U. S. 622, 632.
Pittsburgh, etc., Coal Co. v. *Bates*, 156 U. S. 577–588.
Emert v. *Missouri*, Ib. 296.

Observe, also, rule sustaining proportional tax against interstate carriers respecting property held and earnings derived within state levying the tax.

Adams Express Co. v. *Ohio*, 165 U. S. 195.
S. c. on rehearing, 166 U. S. 185.
Express Co. v. *Kentucky*, Ib. 171.

(*c*) *Ficklen* v. *Shelby Co.*, 145 U. S. 1, at 21.
Brennan v. *Titusville*, 153 U. S. 306.

Note in this connection claim as to conspiracy—also its criminal character under anti-trust act, and absence of proper averment and total absence of proof as to purpose to violate that act.

In re Debs, 158 U. S. 564.
Arthur v. *Oakes*, 63 Fed. 310.
Elder v. *Whitesides*, 72 Fed. 724.
Pettibone v. *United States*, 148 U. S. 203–4.

Third. The arrangement or plan in question, as well as its execution, differs from the transactions involved between purchasers in one state of soliciting agents representing and disposing of goods of their principals in another state (like the class of cases to which *Robbins* v. *Taxing District*, 120 U. S. 489, belongs); because sales made by any of appellants were only incidental to the plan in question or to any determination made under it by the members as among themselves, and were of articles for delivery generally, that is, as well within the state of production and ownership as without (like the class of cases to which *Ficklen* v. *Shelby Co.*, *supra*, belongs); whereas, the other transactions mentioned involved nothing but efforts to sell and purchase and actual sales between buyers and sellers—the latter acting through agents—in one state, of particular goods located and owned in another state and to be delivered and transported outside of that state under *a contractual obligation*, and not merely a mental resolution on the part of the owner alone, to do so. The distinction between these two classes is the difference between a business involving sales generally of both local and non-local character, and one involving sales in one state for delivery in other states only—or, in other words, the difference between indirect, unintentional, and even contingent, effect upon interstate trade and commerce on the one hand, and direct and intentional effect upon such trade and commerce on the other.

ARGUMENT.

I.

COMMON LAW TESTS OF VALIDITY OF PLAN IN DISPUTE IRRELEVANT.

It is not our purpose to argue our propositions *seriatim*. It certainly is not necessary in this court to argue the first one. No doubt it will be conceded by our learned adversary.

The same may be said of the first two members of the second proposition. The claim made on behalf of the government is that the plan of the appellants operated directly to place restraint upon interstate trade or commerce. Unless our learned adversary can make this claim appear affirmatively the decree of the court below must of necessity be reversed.

We do not believe that it is necessary to consume time with either the citation of authorities or the presentation of argument upon the question made in the court below, whether the plan in question would or would not fail according to the principles of the common law; for if it would, we do not understand that such a conclusion would be the true test of whether the plan directly interferes with interstate trade or commerce. If any arrangement made between private individuals or private corporations themselves respecting the manufacture and ultimate disposition of articles of a private character is within the purview at all of the anti-trust act, which may well be denied, still the test of interference with any inhibition there made is not, as it seems to us, whether a state might under its police power forbid and destroy it, but whether its direct and inevitable tendency would interfere with interstate trade and commerce.

Suppose the states in which these foundries are located had through both constitutional and legislative sanction authorized the making of this arrangement, it would scarcely be denied that the states could do so, at least as against every power except that of congress. But under this supposition could the validity of the arrangement under the power of congress be made to depend upon the rules of the common law? Or, on the other hand, suppose an act of a state legislature should in terms authorize such an arrangement, but its right to do so were questionable under its constitution, would the validity of the arrangement, if challenged under the commercial power of congress, be fairly tested by reference to the rules of the common law? It is true that

it might well be argued that even if the anti-trust act was intended to apply to private arrangements of this character, it was not designed to reach reasonable as distinguished from unreasonable plans among owners. But we apprehend that if the act should be held to apply to such plans at all, it would be because they *in fact* directly and inevitably interfere with interstate trade and commerce, and not because they are reasonable or unreasonable according to the principles of the common law.

We have thought it necessary to say this much upon this subject because of the elaborate consideration given it in the opinion of the Court of Appeals. If we are right in our contention, then that portion of the decision below is not relevant to the present inquiry.

In the *Trans-Missouri case* and the *Joint-Traffic case* it was insisted with great force that the common law distinction between reasonable and unreasonable restraints upon trade and commerce should be observed and followed in those cases. As we understand the decisions the distinction was regarded as immaterial, because the anti-trust act itself did not in the opinion of the majority of the court recognize the distinction as respects the restraint upon interstate trade and commerce which it forbade. It is true that the subjects under consideration there were contracts between interstate carriers, fixing prices for the transportation of commodities; and that the railway companies making the agreements were *quasi* public agencies in control of *quasi* public property. But the distinction due to the character of the agencies and properties there involved would tend to prove that private agencies resolving upon a course of conduct among themselves, touching merely private property, were not within the scope and meaning at all of the anti-trust act (*Trans-Missouri case*, at pages 333–5), rather than that the rules of the common law should be employed as an aid in determining whether the effect of any particular ar-

rangement or plan was direct or indirect upon interstate trade and commerce.

Anti-trust act was not designed to deal even with monopolies and the like, as such.

In *United States* v. *E. C. Knight Co.*, 156 U. S., at p. 16, Mr. Chief Justice Fuller, said:

"It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the states or the citizens of the states in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted."

In *United States* v. *Freight Association*, 166 U. S., at p. 326, Mr. Justice Peckham says:

"In the *Knight Company case* (*supra*) it was said that this statute applied to monopolies in restraint of interstate or international trade or commerce, and not to monopolies in the manufacture even of a necessary of life."

In *United States* v. *Joint-Traffic Association*, 171 U. S., pp. 567–8, Mr. Justice Peckham having occasion to allude to a formidable list of contracts which learned counsel supposed, under the decision in the *Trans-Missouri case*, would fall within the anti-trust act, said:

"This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manufacturing pur-

poses has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business. . . . In *Hopkins* v. *United States*, decided at this term, *post*, p. 578, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.' To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri case* is to render illegal most business contracts or combinations, how-

ever indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court."

In *Hopkins* v. *United States*, 171 U. S. 578, it was held that an association of persons to receive consignments of livestock from owners both within and without the states of Missouri and Kansas (across the boundary of which the stock yards were located), to feed the stock and prepare it for market, and also dispose of it, and receive the sales proceeds from the purchasers and pay them to the owners, less charges, expenses and advances, was not in violation of the anti-trust act; although the members were in the habit of soliciting consignments from owners of stock in other states and making advances thereon; although the rules of the association forbade members from buying livestock from a commission merchant in Kansas City not a member; although the members fixed the commissions for selling livestock, prohibited the employment of agents to solicit consignments except upon a stipulated salary, and forbade the sending of prepaid telegrams or telephone messages with information as to the state of the market; and although no members could transact business with any person violating these rules.

In *Anderson* v. *United States*, ib. 604, it was decided that an association and certain of its rules under which its members acted were not in violation of the anti-trust act, such members bearing much the same relation to the association and carrying on much the same business as that of the members of the association passed upon in *Hopkins* v. *United States;* the main difference being that the members of the traders' exchange were purchasers of cattle while the members of the livestock exchange were commission merchants. The disputed rules in substance provided that the exchange

would not recognize any yard trader who was not a member; that if one of a co-partnership should be a member of the exchange, then all the co-partners should; that no member of the exchange should employ any person except a co-member to buy or sell cattle, or pay any order buyer or salesman a fee for buying cattle from or selling cattle to a person not a member.

The contention in those cases was that soliciting consignments of livestock from other states for the purpose either of handling the stock for the owners upon a commission or for the purpose of purchasing the stock, through such restricted membership, directly interfered with interstate trade and commerce. But this court held that such associations rather facilitated than placed restraints upon such trade and commerce; and at most that the restraints were only indirect and remote.

In the light of the foregoing decisions, there ought not to be much difficulty, as it seems to us, in determining whether the present plan ever operated in any forbidden way upon interstate trade or commerce.

All that appellants did in making or executing the plan was wholly between themselves, not with purchasers, and while their property was within their own exclusive dominion and control.

In considering whether this plan or its execution was a direct restraint upon interstate trade or commerce, we should first classify some features which obviously belong to the inquiry. In the first place, sales of pipe to the cities or persons within the immediate vicinity of the foundries, respectively, and all transactions had in that regard, were plainly of a local character only. So of sales and negotiations leading up to sales from foundries for delivery within the states where they were severally located. In the next place, the mere concurrence of the appellants in

the plan adopted, even so far as it may be said to have contemplated disposal of property for delivery in other states, was, as regarded all strangers to the plan, the same as the mental operation of a single individual. It might be changed. No sales might be made. It finds analogy in decisions like that of *Coe* v. *Errol*, where Coe had prepared his logs and placed them on the bank of the Androscoggin river with intent, so far as his own mental operation was concerned, to float them along the river into another state at the first opportunity, and there to sell them. The logs were not then in course of transportation, and the purpose and intent of a single individual is not commerce. So it may be said of the cast-iron pipe, whether manufactured or not; so also of the concurrence in purpose and intent of two or more persons or corporations touching their joint conduct in the future respecting the disposition of their cast-iron pipe. Let us examine this for a moment.

The commercial power of congress so far as this case is concerned, is "to regulate commerce . . . among the several states." There must therefore be commerce before any regulation made in pursuance of the power can operate. Commerce, it is true, is a broad term in its meaning and significance. It is unnecessary to repeat the definitions so often given in this court. It is enough to say now that it contemplates intercourse between two or more persons for purposes of purchase, sale or exchange of articles, as well as transportation. There are two or more sides to the transactions so contemplated. There must be persons represented upon the several sides. To say that there is commerce between persons who are all upon the same side of a given proceeding would be to say that a single person could engage in commerce by negotiating or contracting with himself. When, therefore, the appellants concurred in their plan, they simply settled a course of conduct for themselves. They had not reached the point of commercial intercourse.

They had not begun to engage in commerce. They were not then either making sales or trying to. They were not transporting any article of commerce. They only determined to do so when occasion should arise. Such conduct, such action, is not commerce or the subject of regulation at all on the part of congress. Until something more was done, all questions of commerce or transportation were matters "altogether *in fieri*, and not at all a fixed and certain thing."

We may now proceed to the next stage of the plan. We shall not consider the whole plan unless we observe and bear in mind that it involved the manufacture and sale of cast-iron pipe generally; that is to say, in each state where one or more of the foundries were located, and its sale in other states, according as opportunity might arise. It contemplated local and interstate traffic indifferently. It related to no particular purchasers, but to purchasers in general. There was consequently no legal relationship created between any of the appellants on the one side and any purchaser on the other, until a contract was made, no matter whether the purchasers were within the state in which the foundry fixed upon for delivering the pipe was located or in some other state. This case differs in this important respect from *United States* v. *Coal Dealers' Assn.*, and *United States* v. *Jellico Mountain Coal and Coke Co.*, referred to in *Anderson* v. *United States*, cited *supra*, 617.

What then is to be said of the action of the appellants when they reached a point of considering a supply of cast-iron pipe, occasioned say by a general advertisement calling for bids? The evidence shows that in nearly all, if not quite all, such cases the advertisement would require pipe of given dimensions and weight. This would result in having to manufacture the pipe specially. Whatever was to be done then necessarily related to a subject for future manufacture.

But the first thing to be done according to the plan existing when this cause was begun, was to have a meeting of

the representatives of appellants. The meeting did not provide for the presence of the proposed buyer either in person or by agent. It is said with some force that he was not expected to be present. It is said that this was a secret meeting. Its purpose was to determine, first, whether any of appellants should bid at all; secondly, what one of them should do so. Here again was a conference between the appellants themselves for their own purposes respecting their own private interests. As it seems to us, there can be no sort of relation between any action so taken among appellants and any federal regulation of commerce. Such action could not do more than to fix a course of conduct for appellants. It was not until after this was completed that any intercourse could begin with a proposed purchaser. It is said that the meeting was also called to fix a price. We do not understand this to be quite accurate. We think it was a meeting to select the company which should fix its own price and bid.

But assume that the purpose of the meeting included the fixing of a price. The price had to be made with reference to outside and eager competitors. What material difference is there between the consummation of such a mode of entering upon competition and that which a single individual adopts for himself? True it resulted in some of appellants declining to bid. They were not bound to. True also that those who so declined received a portion of what may be conceded to be the profits or expected profits of the enterprise if the company chosen to bid should obtain a contract. But the action thus far was by *themselves*, for the promotion of their own interests. No contract whatever in the remotest way was up to that time negotiated or made with any person proposing to purchase. The action was exactly like that of an individual calculating first upon whether he would bid, and, next, at what price; except, only, the concurrence involved here of several minds in reaching

the conclusion which a single mind in the case supposed attained alone. The point is that no stage of trade or commerce, either local or national, had up to this time been reached.

It will be borne in mind that the foregoing observations are intended, not only as a fair analysis of the action contemplated and taken under the plan by the parties themselves, but also and particularly to show their collateral and indirect bearing upon interstate trade and commerce.

But it has been said that this plan and its execution should be denounced as a conspiracy in restraint of interstate trade and commerce. It should be observed, however, that if it be a conspiracy it is one not merely of an unlawful but of a criminal character. The first three sections of the anti-trust act declare the things there forbidden to be misdemeanors, and upon conviction they provide for imposing punishment, both by fine and imprisonment. The fourth section also vests in the Circuit Courts jurisdiction to prevent violations by injunction. The giving of this preventive remedy does not change the criminal character of the conspiracy itself.

In re Debs, 158 U. S. 564.
Arthur v. *Oakes*, 63 Fed. 310.
Elder v. *Whitesides*, 72 Fed. 724.

It would, therefore, seem clear that the nature of the conspiracy here forbidden would, in order to sustain either an action of the present kind or an indictment, require both averment and proof of *a purpose* to restrain or interfere with *interstate* trade or commerce. Even if the averments of the bill in this case could be said under a liberal construction to charge a conspiracy of this character, which we deny, still we do not understand it to be even claimed that there is *any proof* of *a purpose* on the part of appellants to enter into any such conspiracy to interfere with *interstate* trade or com-

merce. The utmost that could be said would be that a purpose on their part might be inferred to restrict competition among themselves, so as to fall within the rules of the common law. This we do not admit, though for reasons already stated we do not discuss the question. It is however plain that a purpose to violate the common law—we hardly need say there are no common law crimes within federal cognizance—or a state law, would not justify either a decree in such a cause as this, or a conviction under an indictment for conspiracy within the meaning and intendment of the anti-trust act.

Pettibone v. *United States*, 148 U. S. 187, 203–4.

We may then safely recur to what we may call the unilateral acts of the appellants; that is to say, the acts among themselves in formulating the plan and in carrying it into execution down to and including the selection of one of the members to make a proposal to supply cast-iron pipe under an advertisement for bids. We insist that no matter what name may be given to the relations which they entered into as between themselves—whether we call it a contract, combination, conspiracy or monopoly—it did not up to the stage of completion mentioned touch upon commerce at all; and that its ulterior or other effect, if there was any, upon interstate trade or commerce was of the most indirect character.

Let us consider finally what happened after the company to make the bid was chosen. As we understand the evidence the company was then acting as any ordinary individual would with respect to his own affairs, who was compelled to enter the field of competition with other manufacturers of cast-iron pipe who were in nowise connected with this plan. The fact that occasionally one or more of the other appellants would put in proposals at higher sums than that of the one so chosen, seems to us to be totally irrelevant. It might be conceded for the sake of

argument that such conduct would have entitled the purchaser to avoid the contract in case the company so chosen was the successful bidder; but that would affect interstate trade or commerce only remotely if at all. Plainly the purpose was not to interfere with that sort of trade or commerce. If the person so chosen became the successful bidder, it does not appear that he would not have succeeded at the same price if his co-members had entered into an actual contest for the contract. There were actual contests with other competitors. The success of the chosen company was consequently due to bidding a lower rate than other confessedly honest competitors could offer. It might as well be said, and we believe it was suggested below, that the successful bidder in such case possessed geographical advantages over his real competitors. This is a circumstance only of an ordinary character. It is like the case of a particular manufacturer being able through superior experience or ability, or otherwise, to turn out his products more economically than his competitors. But is it to be supposed for a moment that these accidental advantages or disadvantages are matters which congress either sought to regulate or could regulate? All such matters are as plainly collateral to the main issue as they are obviously incidental and indirect in their effects upon interstate trade and commerce.

It will not be forgotten in this connection that this same mode of selecting a bidder was followed in leading up to the making of proposals for the sale and delivery of pipe within the states in which one or more foundries of the appellants were located. This necessarily resulted frequently if not always in the making of the contracts solely between a selling company and a purchaser located in the same state. This emphasizes our contention that both the plan and its execution affected interstate trade and commerce only indirectly and remotely.

II.

The present case is not like the class of cases to which Robbins *v.* Taxing District belongs.

The Court of Appeals, as we understand, regarded the plan in question as falling within the principles laid down in the class of cases just mentioned. The argument already made has necessarily to a large extent anticipated this view. The precise point decided in that class of cases is, that it was interstate commerce to negotiate and contract in one state for the sale and delivery to the purchaser in that state of goods then located and owned in another state. The transaction was in a particular state; it involved business intercourse between citizens of different states, the seller acting by agent; it contemplated, and if a sale was completed, involved, a *contractual obligation* to deliver and transport certain specified goods, at a named time, from another state, belonging to a citizen of that state; such transactions and such only were intended to be or in fact were entered into. In short, the business there involved related to articles to be carried from one state to another, and nothing else; and the purpose so to make them subjects of interstate commerce was fixed by contractual obligation. Every thing done by way of negotiation was with reference to that obligation. The effort was to tax this traffic by calling it a drummer's tax. Such an exaction was an obvious discrimination against the persons and property of other states, in favor of citizens of the state levying the tax. Mr. Justice Bradley said in the *Robbins case:*

"This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. . . . It shows

that it not only operates as a restriction upon interstate commerce, but that it is *intended* to have that effect as one of *its principal objects.*" (120 U. S., at p. 498; *italics ours.*)

If we have made a clear statement of that class of cases, we think that it alone will fully distinguish the cases from the one at bar. We but repeat, when we recall the facts, that the plan in question here contemplated and provided for general business, that is to say, business with both local buyers and buyers of other states indifferently; that the concurrence in the plan and every thing done under it involved intercourse only between the parties to the plan itself; and that, when a bidder was selected, he alone, upon his own behalf, in his own interest, either proposed to contract or in fact contracted indifferently as between local buyers and buyers in other states, according to where the residence of the purchaser might happen to be.

It would seem to us that the class of cases to which *Ficklen* v. *Shelby County*, 145 U. S. 1, belongs, would be more in point than the *Robbins case* or its class. The complaining merchandise brokers in the *Ficklen case* were able to show that their principals were as to one of the brokers wholly non-resident, and as to the other largely so; and say the court: "This, however, may have been otherwise then and afterward, as their business was not confined to transactions for non-residents." Mr. Chief Justice Fuller continuing, at page 21, said:

"In the case of *Robbins* the tax was held, in effect, not to be a tax on Robbins, but on his principals; while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom."

Could these appellants have resisted taxes of any sort levied by their respective states upon the ground that they, like Robbins, were engaged exclusively in interstate traffic?

Would not their claim have been overthrown by the principles laid down in the *Ficklen case?* As it seems to us, the effort to use a case like that of *Robbins*, which involved only transactions of an interstate character, to control the present cause, is to select merely the transactions of that character which happened to occur with appellants and so to isolate those transactions from those of a local character, only to force an analogy and not to discover one by any process of comparison of natural attributes.

Is it necessary to pursue the distinction further?

Clearly appellants' plan did not affect interstate trade or commerce any more than does an indefinite variety of plans or contracts or arrangements which are confessedly lawful. All business and business transactions of a general character affect interstate trade and commerce more or less, but indirectly only. For illustration, in *United States* v. *E. C. Knight Co.*, Mr. Chief Justice Fuller, at page 17, said:

"It is true that the bill alleged that the products of these refineries were sold and distributed among the several states, and that all the companies were engaged in trade or commerce with the several states and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other states, and *refined sugar was also forwarded by the companies to other states for sale.* Nevertheless, it does not follow that an attempt to monopolize, or the actual monopoly, of the manufacture was an attempt, whether executory or consummated, to monopolize commerce, *even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked.*" (Italics ours.)

In *Hopkins* v. *United States*, *supra*, it was strongly urged that there were many restrictions which placed restraints upon interstate trade and commerce. To illustrate,

section 10 of Rule IX prohibited any commission firm or corporation from hiring more than three solicitors at any one time upon a stipulated salary, and it was urged that they were engaged in interstate commerce, that this was an unlawful inhibition upon the privilege possessed by those persons under the constitution to make lawful contracts in furtherance of their business, and that in this respect those members had surrendered their dominion over their own business and permitted the exchange to establish a species of regency, etc. But Mr. Justice Peckham, at pp. 602, 603, says:

"We say nothing against the constitutional right of each one of the defendants and each person doing business at the Kansas City stock yards to send into distant states and territories as many solicitors as the business of each will warrant. This original right is not denied or questioned. But can not the citizen, for what he thinks a good reason, contract to curtail that right? To say that a state would not have the right to prohibit a defendant from employing as many solicitors as he might choose, proves nothing in regard to the right of individuals to agree upon that subject in a way which they may think the most conducive to their own interests. What a state may do is one thing, and what parties may contract voluntarily to do among themselves is quite another thing."

In *Anderson* v. *United States*, cited *supra*, at p. 616, Mr. Justice Peckham, having occasion to speak of the general though indirect effect of acts both of states and individuals upon interstate commerce, said:

"As said in *Smith* v. *Alabama*, 124 U. S. 465, 473: 'There are many cases, however, where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations.' The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of

their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void. We think, within the plain and obvious contruction to be placed upon the act, and following the rules in this regard already laid down in the cases heretofore decided in this court, we must hold the agreement under consideration in this suit to be valid."

Respectfully submitted,

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